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FOUNDATIONS OF CRIMINAL JUSTICE

COMMENTARIES ON THE CRIMINAL LAW

BY
JOEL PRENTISS BISHOP

VOL. II

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FOUNDATIONS OF CRIMINAL JUSTICE

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COMMENTARIES

ON

THE CRIMINAL LAW.

BY

JOEL PRENTISS BISHOP.

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CRIMINAL LAW.

CRIMINAL LAW.

BOOK X.

SPECIFIC OFFENCES.

For ABDUCTION OF WOMEN, as to both law and procedure, see Stat. Crimes. And see SEDUCTION.

ABORTION, as to both law and procedure, see Stat. Crimes.

ADULTERATED MILK, selling of, as to both law and procedure, see Stat. Crimes.

ADULTERY, fornication, and kindred offences, as to both law and procedure, see Stat. Crimes.

CHAPTER I.

AFFRAY.[1]

§ 1. **How defined.** — An affray is the fighting together of two or more persons, either by mutual consent or otherwise, in some public place, to the terror of the people.[2]

Distinguished from Assault — From Riot — How Public. — "An assault which happens in a private place, out of the hearing or seeing of any except the persons concerned, cannot be said to be to the terror of the people, and is thus distinguished from an affray; and an affray differs also from a riot in this, that three persons at least are necessary to constitute a riot, whereas two persons only may be guilty of an affray."[3] So there may be an affray on a falling out too sudden to amount to a riot.[4]

§ 2. **Further as to the Place.** — We have seen[5] what is the meaning of the words "public place" in statutes against gaming,

[1] See RIOT; ROUT. For the pleading, practice, and evidence, see Crim. Proced. II. § 16 et seq. And for further views relating to Affray, see Stat. Crimes, § 539, 542, 560. As to the right to suppress affrays, see post, § 653 et seq., and Crim. Proced. I. § 166, 183.

[2] Vol. I. § 535.

[3] 1 Gab. Crim. Law, 62. And see 1 Hawk. P. C. Curw. ed. p. 487, § 1.

[4] 1 Hawk. P. C. Curw. ed. p. 514, § 3, 1 Russ. Crimes, 3d Eng. ed. 291.

[5] Stat. Crimes, § 298; Vol. I. § 1128.

and in the common law which makes the public exposure of the person an indictable nuisance; and evidently their signification is the same in the common-law definition of affray. The indictment must charge the act to have been done at a public place, or in some locality which appears to have been public, and the proof must sustain this allegation.[1] A field one mile from the highway, and surrounded by a forest, has been held not to be a place in which this offence could be committed, though three spectators were casually present at the fight;[2] but an enclosed lot, ninety feet from the street, and visible from it, has been adjudged to be public within our definition.[3] If the fight ends at a public place, though commencing at a private one, it is sufficient.[4]

§ 3. **The Fighting — (Words — Blows — Minor Breaches of Peace).** — Mere words are not a fighting within the definition of affray.[5] And if one by insulting language provokes another to attack him in a public place, but offers no resistance to the attack when made, he does not become guilty of this offence.[6] If he were himself ready to fight, while the other gave the first blow, it would be otherwise.[7] The majority of the Tennessee judges apparently laid down the doctrine, that no acts creating terror, short of coming to blows, are sufficient.[8] "But," says Hawkins, "granting that no bare words, in the judgment of the law, carry in them so much terror as to amount to an affray, yet it seems certain that, in some cases, there may be an affray where there is no actual violence; as, where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by many

[1] The State *v.* Sumner, 5 Strob. 53; The State *v.* Heflin, 8 Humph. 84; Wilson *v.* The State, 3 Heisk. 278; Train & Heard Prec. 27; Crim. Proced. II. § 19.

[2] Taylor *v.* The State, 22 Ala. 15. See Vol. I. § 243–246; Simpson *v.* The State, 5 Yerg. 356; The State *v.* Heflin, 8 Humph. 84; The State *v.* Sumner, 5 Strob. 53; Reg. *v.* Hunt, 1 Cox C. C. 177.

[3] Carwile *v.* The State, 35 Ala. 392.

[4] Wilson *v.* The State, supra.

[5] 1 Hawk. P. C. Curw. ed. p. 487, § 2. See post, § 25.

[6] O'Neill *v.* The State, 16 Ala. 65. And see 1 Russ. Crimes, 3d Eng. ed. 292. Yet it has been held, that, if one by such abusive language toward another as is calculated and intended to bring on a fight, induces the other to strike him, he is guilty of an affray, though he may be unable to return the blow. The State *v.* Perry, 5 Jones, N. C. 9.

[7] The State *v.* Sumner, 5 Strob. 53.

[8] Simpson *v.* The State, 5 Yerg. 356. See The State *v.* Allen, 4 Hawks, 356; Cash *v.* The State, 2 Tenn. 198.

statutes."[1] The case thus put by Hawkins seems not to be one of affray, which requires two persons, but a mere indictable breach of the peace in the nature of a public nuisance, which may even be committed by a single individual.[2] Still it conducts us to the better doctrine; namely, that actual blows are not necessary, provided the combatants, arming themselves, proceed so far as reasonably to excite terror in persons who may witness them.[3] Perhaps the true statement is, that what is done must sustain the same relation to a fighting which an assault does to a battery.[4]

§ 4. **The Terror.** — There seems to be required no actual terror among the spectators; but such as the law will infer from the fighting is sufficient in the absence of terror in fact.[5]

§ 5. **Aggravations of the Offence.** — Affray, like assault,[6] may be committed under circumstances of special aggravation, when, ceasing to be known as affray, it will merely constitute an element in a higher crime; or, without changing its name, it will in fact become a higher offence, or appeal to the discretion of the court for a heavy punishment, thus, —

Illustrations — (Duel — Persons — Place, &c. — Rescue). — It "may receive," says Russell, "an aggravation from its dangerous tendency: as where persons coolly and deliberately engage in a duel,[7] which cannot but be attended with the apparent danger of murder, and is not only an open defiance of the law, but carries with it a direct contempt of the justice of the nation, putting men under the necessity of righting themselves. And an affray may receive an aggravation from the persons against whom it is committed: as where the officers of justice are violently disturbed in the due execution of their office by the rescue of a person legally arrested, or the bare attempt to make such a rescue; the ministers of the law being under its more immediate

[1] 1 Hawk. P. C. Curw. ed. p. 488, § 4.

[2] Vol. I. § 536–540.

[3] Hawkins *v.* The State, 13 Ga. 322; O'Neill *v.* The State, 16 Ala. 65; The State *v.* Lanier, 71 N. C. 288; The State *v.* Davis, 65 N. C. 298. The reader who consults these cases, however, will see that this sort of offence is sometimes called affray.

[4] Lord Coke says: "An affray is a public offence to the terror of the king's subjects; and is an English word, and so called because it affrighteth and maketh men afraid." 3 Inst. 158. The word, however, is said to be derived from the French *effrayer*, to terrify. 1 Russ. Crimes, 3d Eng. ed. 291.

[5] The State *v.* Sumner, 5 Strob. 53.

[6] Post, § 43–54.

[7] It is evident that a duel would not usually, at least not always, be an affray. And see post, DUELLING.

protection. And, further, an affray may receive an aggravation from the place in which it is committed. It is therefore severely punishable when committed in the king's courts, or even in the palace-yard near those courts; and it is highly finable when made in the presence of any of the king's inferior courts of justice. And upon the same account, also, affrays in a church or church-yard have always been esteemed very heinous offences, as being very great indignities to the Divine Majesty, to whose worship and service such places are immediately dedicated." [1]

§ 6. **Aggravations, continued — Raised from Misdemeanor to Felony.** — When, however, the act, though an affray, amounts also to some higher crime, it will usually, in practice, be indicted as the higher crime. If it constitutes a felony, perhaps the result will follow from principles already explained,[2] that it can be proceeded against only as such; since an affray, at common law, is simply a misdemeanor.

§ 7. **Analogous Offences.** — We have seen,[3] that there are unnamed misdemeanors indictable at the common law, in the nature of affray, while still they are not technically such. Moreover there are several distinct common-law offences analogous, in a greater or less degree, to this common-law nuisance of an affray. It may be well to examine, in this connection, such titles as Duelling, Riot, Rout, Unlawful Assembly, and the like.

Statutory Affrays. — So there are statutes, in some of the States, against fighting together, by two or more individuals, in pursuance of a previous appointment, and the like; creating offences differing, perhaps, in a greater or less degree from the common-law affray.[4]

Statutory Disturbances of the Peace. — And there are statutes [5] and city ordinances [6] against disturbances of the peace by loud noises and in other ways, differing more or less in their terms, and creating offences analogous to affray.

[1] 1 Russ. Crimes, 3d Eng. ed. 291, 292.
[2] Vol. I. § 787, 815.
[3] Ante, § 3.
[4] And see Commonwealth *v.* Welsh, 7 Gray, 324; Shelton *v.* The State, 30 Texas, 431.
[5] Noe *v.* People, 39 Ill. 96.
[6] St. Charles *v.* Meyer, 58 Misso. 86.

CHAPTER II.

ARSON AND OTHER BURNINGS.[1]

§ 8, 9. Introduction.
10. What is a Burning.
11. What is a House.
12, 13. Ownership or Occupancy of the House.
14–16. Means and Intent of the Burning.
17. Statutory Burnings.
18–21. Remaining and Connected Questions.

§ 8. **Definition.** — Arson, at the common law, is the malicious burning of another's house.[2]

§ 9. **How the Chapter divided.** — The inquiries suggested by this definition are, therefore, I. What is a Burning; II. What is a House; III. The Ownership or Occupancy of the House; IV. The Means and Intent of the Burning. After discussing these we shall consider, V. Statutory Burnings; VI. Remaining and Connected Questions.

I. *What is a Burning.*

§ 10. **General Doctrine.** — For the particular discussion of this question, the reader is referred to the work on Statutory Crimes.[3] The burning must be, not merely of personal property in the

[1] See, for matter relating to this title, Vol. I. § 224, 318, 329, 334, 514, 559, 577, 640, 765, 781. For the pleading, practice, and evidence, see Crim. Proced. II. § 33 et seq. For various views relating to the law and procedure in statutory arsons, see Stat. Crimes, § 207, 213, 277, 289, 310, 311, 363, 534–538.

[2] Vol. I. § 559. The books do not differ materially in their definitions of arson. Lord Coke treats of this offence under the title "Burning of Houses," and says: "Burning is a felony at the common law, committed by any that maliciously and voluntarily, in the night or day, burneth the house of another." 3 Inst. 66. Hawkins says: "Arson is a felony at common law, in maliciously and voluntarily burning the house of another, by night or by day." 1 Hawk. P. C. Curw. ed. p. 137. East: "Arson, which was felony at common law, and anciently punished with death, is described to be the malicious and voluntary burning the house of another." 2 East P. C. 1015. The same, 2 Russ. Crimes, 3d Eng. ed. 548. The definition in the text is identical with these in meaning, but in form it is a little more compact.

[3] Stat. Crimes, § 310; Vol. I. § 224.

house, but of something which is of the realty.[1] There need not be a blaze; some wasting must take place of the fibres of the wood, it is immaterial to how small an extent. And if then the fire is extinguished, that makes no difference.[2]

II. *What is a House.*

§ 11. **General Doctrine.** — Likewise the meaning of the word "house," in the definition of arson, is discussed in the work on Statutory Crimes.[3] In general terms, it is a building, with its out-buildings, finished for habitation; possibly it must be actually inhabited, but probably not. In statutes creating arsons, the word "*dwelling*-house" is sometimes employed; and, in such a case, if the building is finished for habitation, yet if it has never been inhabited, it does not come within the statutory term.[4]

III. *The Ownership or Occupancy of the House.*

§ 12. **One's own House.** — How the ownership is to be alleged in the indictment is a question considered in another connection.[5] Arson is an offence against the security of the habitation, rather than the property.[6] When, therefore, we say that the house burned must be another's, the meaning is, that it must be another's to occupy. Consequently, at common law, a man cannot commit arson of his own house, even when it is insured.[7] But, in some of our States, there are statutes in such terms that under them a man can commit arson of his own house.[8] Thus, in New Hampshire, the words of the statute are, "wilfully and maliciously burn *any* dwelling-house," and this is held to include the burning of one's own habitation when done "wilfully and maliciously;" as, said Doe, J., "if he burns it for the purpose of destroying the home and lives of his wife and children; . . . and there may be malice in other cases."[9]

[1] Graham *v.* The State, 40 Ala. 659.

[2] People *v.* Haggerty, 46 Cal. 354.

[3] Stat. Crimes, § 213, 277, 289.

[4] Commonwealth *v.* Barney, 10 Cush. 478; Stat. Crimes, § 289.

[5] Crim. Proced. II. § 36–39.

[6] Vol. I. § 577; The State *v.* Toole, 29 Conn 342.

[7] Rex *v.* Spalding, 1 Leach, 4th ed. 218, 2 East P. C. 1025; Rex *v.* Proberts, 2 East P. C. 1030; Roberts *v.* The State, 7 Coldw. 359. And see Bloss *v.* Tobey, 2 Pick. 320, 325.

[8] The State *v.* Elder, 21 La. An. 157; Shepherd *v.* People, 19 N. Y. 537.

[9] The State *v.* Hurd, 51 N. H. 176, referring to The State *v.* Avery, 44 N. H 392.

Insured. — Especially there are statutes making it arson for one to burn his house or other building with the intent to defraud an insurance office.[1] The intent to defraud being the gist of this form of the offence, it has been held in Illinois to be immaterial, when this intent exists, whether the policy on the building is valid or not.[2] But the contrary is believed to be the better doctrine, namely, that the insurance must be valid;[3] because this is an attempt to defraud, and in attempts there must be a real or apparent possibility of accomplishing the wrong undertaken,[4] — as, a boy under fourteen cannot in law attempt to commit a rape,[5] and forgery cannot be committed of an instrument which if genuine would be of no legal validity.[6]

§ 13. **Tenant — Mortgagor in Possession.** — Whether a mere tenant at sufferance can, at common law, be guilty of arson by burning the premises, is, perhaps, a point not expressly adjudicated, though it seems he cannot.[7] A man cannot commit it of a house in which he has a lawful claim to abide: as a tenant from year to year, or from month to month,[8] be his term however short; or under an agreement for a lease;[9] or as mortgagor in possession, though the mortgage divested him of the legal title;[10] or otherwise.

Wife — Husband. — Neither does a wife become guilty of this

[1] People *v.* Schwartz, 32 Cal. 160; People *v.* Hughes, 29 Cal. 257. In New York, by force of the statute, such an act may be arson of the first degree. Shepherd *v.* People, 19 N. Y. 537, 542, overruling People *v.* Henderson, 1 Parker, 560, and a dictum in People *v.* Gates, 15 Wend. 159.

[2] McDonald *v.* People, 47 Ill. 533. See People *v.* Hughes, supra.

[3] If this proposition has not been directly adjudged, it appears to have been assumed in various cases. Evans *v.* The State, 24 Ohio State, 458; Jhons *v.* People, 25 Mich. 499; The State *v.* Watson, 63 Maine, 128; Rex *v.* Ellicombe, 5 Car. & P. 522, 1 Moody & R. 260; Rex *v.* Doran, 1 Esp. 127; Reg. *v.* Kitson, Dears. 187, 20 Eng. L. & Eq. 590.

[4] Vol. I. § 738.

[5] Vol. I. § 746.

[6] Vol. I. § 748; post, § 538.

[7] See Sullivan *v.* The State, 5 Stew. & P. 175; Rex *v.* Spalding, 1 Leach, 4th ed. 218, 2 East P. C. 1025; People *v.* Van Blarcum, 2 Johns. 105, where the court said of the question of ownership: "It is enough that it was his [the occupant's] actual dwelling at the time;" and declined to inquire into the terms on which he held it. But see Ritchey *v.* The State, 7 Blackf. 168; 2 East P. C. 1022.

[8] Rex *v.* Pedley, 1 Leach, 4th ed. 242, Cald. 218, 2 East P. C. 1026; McNeal *v.* Woods, 3 Blackf. 485; Holmes's Case, Cro. Car. 376, W. Jones, 351; 1 Hawk. P. C. Curw. ed. p. 138, § 7, 10. It seems, however, that he may be an accessory before the fact to the crime of another who burns the house Allen *v.* The State, 10 Ohio State, 287, 302.

[9] Rex *v.* Breeme, 1 Leach, 4th ed. 220, 2 East P. C. 1026.

[10] Rex *v.* Spalding, 1 Leach, 4th ed. 218, 2 East P. C. 1025.

offence by burning her husband's house.[1] So also, if, under the late statutes which prevail in most of our States, a wife owns the house in which she and her husband reside, he cannot commit arson by burning it, though the statute of arson has the words "dwelling-house of *another*."[2]

Servant. — A servant, however, who merely dwells within the building while the legal possession remains in the master, sustains to it a different relation, and he commits the offence when he maliciously burns it.[3]

Landlord. — There is little doubt, though the point appears not to have been directly decided, that, if a person maliciously sets fire to a house of which he is the general owner, but which is lawfully in the possession of another, as tenant or otherwise, it is arson.[4]

Widow dowable. — A widow, entitled to dower, cannot claim to occupy any part of the premises, until the dower is assigned to her;[5] therefore she has not such an interest therein as frees her from the guilt of this offence, if she maliciously burns the house.[6]

IV. *The Means and Intent of the Burning.*

§ 14. **Not Specific Intent — (Accidental Burning — Degree of Malevolence).** — Arson does not belong to that class of offences, spoken of in the preceding volume,[7] which require a specific intent to do the particular thing, in distinction from general malice.[8] Therefore if one, not meaning to burn a house, accidentally burns it while endeavoring to do some other wrong, he is guilty of arson, provided the wrong he intends is of sufficient magnitude.[9] But because arson is a felony at the common law, and because there is at the common law no low degree of it (such as man slaughter is in felonious homicide), the courts have required a

[1] Rex *v.* March, 1 Moody, 182, decided on Stat. 7 & 8 Geo. 4, c. 30, § 2.

[2] Snyder *v.* People, 26 Mich. 106. And see 2 Bishop Mar. Women, § 152.

[3] Rex *v.* Gowen, 2 East P. C. 1027, 1 Leach, 4th ed. 246, note.

[4] Rex *v.* Harris, 2 East P. C. 1023, 1024, Foster, 113, 115; 1 Gab. Crim Law, 76; 4 Bl. Com. 221; Sullivan *v.* The State, 5 Stew. & P. 175; Sweetapple *v.* Jesse, 5 B. & Ad. 27. Commonwealth *v.* Erskine, 8 Grat. 624, decided under a statute, may perhaps be deemed an adjudication of the exact point in the text.

[5] Bolster *v.* Cushman, 34 Maine, 428; 1 Bishop Mar. Women, § 349–352.

[6] Rex *v.* Harris, supra.

[7] Vol. I. § 320, 335, 342, 411.

[8] Thomas *v.* The State, 41 Texas, 27; Reg. *v.* Regan, 4 Cox C. C. 335.

[9] Vol. I. § 327, 330, 334.

greater evil in the intent, to constitute it where the act is not specifically meant, than is necessary to constitute most other crimes of this class.[1]

§ 15. **Burning through Negligence, while committing a Civil Trespass.** —Thus, although mere carelessness is criminal,[2] Lord Coke has said, what is no doubt correct as a general proposition, that a burning "done by mischance or negligence" is not arson.[3] And the same is true where the burning results accidentally from the intentional commission of a mere civil trespass.[4] But if, to defraud an insurance office, where the common law on the subject prevails, a man sets fire to his own house, whereby his neighbor's is burned, he is guilty of arson in burning the neighbor's;[5] so that it is not absolutely necessary the intent should be to commit a felony.

Intent to commit Felony — Burning House not meant. — *A fortiori*, if one, intending to burn the house of a particular person, accidentally burns another's, he commits the offence;[6] as doubtless he does in all cases where his intent is to do an act which is a felony.[7]

Burning Jail to escape.[8] — If a prisoner burns a hole in his cell, or otherwise burns the building in which he is confined, not from a desire to consume the building, but to effect his escape, his offence must be, according to the foregoing doctrines, arson. And so it has been held.[9] On the other hand, the contrary has also been held;[10] and, unhappily, on this side are the majority of the cases. One learned judge, after yielding to the authorities which sustain this erroneous view, added: "If, however, a prisoner, or a number of prisoners in concert, should set fire to a jail without

[1] Vol. I. § 334. In New York, a statute regulates the offence; and, under it, there are different degrees. People *v.* Henderson, 1 Parker, 560; Shepherd *v.* People, 19 N. Y. 537. It is so likewise in some of the other States.

[2] Vol. I. § 216, 217, 313, 321.

[3] 3 Inst. 67. And see 2 East P. C. 1019. "By statute 6 Anne, c. 31, § 3," says Mr. East, ib., "any servant negligently setting fire to a house or outhouse, shall, on conviction before two justices of the peace, forfeit 100*l.* or be sent to the house of correction eighteen months."

[4] 2 East P. C. 1019; Vol. I. § 334.

[5] Rex *v.* Proberts, 2 East P. C. 1030, 1031; Rex *v.* Isaac, 2 East P. C. 1031.

[6] 3 Inst. 67.

[7] Vol. I. § 334; 2 East P. C. 1019.

[8] A jail is an "inhabited dwelling-house," within the statutes of arson. Stat. Crimes, § 207.

[9] Luke *v.* The State, 49 Ala. 30.

[10] People *v.* Cotteral, 18 Johns. 115. The State *v.* Mitchell, 5 Ire. 350, decided, however, under a statute, which possibly influenced the result; Delany *v.* The State, 41 Texas, 601. See Jenkins *v.* The State, 53 Ga. 33.

such definite purpose, but for the purpose of burning the jail sufficiently to produce the alarm of fire, and in the consequent confusion make an escape, being at the same time indifferent as to whether the jail was consumed or not, that would be arson." [1] It is difficult to see why this admission should not carry with it the entire better doctrine.

Two Intents. — And hence we see, that, in arson, as in other crimes,[2] if the accused had the law's evil intent, his guilt remains, though he had also some other intent. Thus, if the primary object of a prisoner in setting a fire is to obtain a reward for giving the earliest information of the fire at an engine station, he thereby commits arson. And "the jury," said Erle, J., "will be perfectly justified in finding that his intent was to injure the person whose property the premises were, and who would necessarily be injured by such an act, although he might have an ulterior object of obtaining the reward." [3]

§ 16. **Kindling Fires incautiously — Burning own House to burn Neighbor's.** — There is another class of cases, governed partly by the principle laid down in the last two sections; and partly by the doctrine, that, as a question of proof, a man is presumed to intend the natural and probable consequences of his own voluntary act.[4] If, therefore, one kindles a fire in a stack, situated so that it is likely to communicate, and communicates in fact, to an adjoining building, he is chargeable with burning the building.[5] And for a still stronger reason, if he applies the torch to his own house, intending to burn his neighbor's also, and the neighbor's is burned, he commits this offence.[6]

V. *Statutory Burnings.*

§ 17. **General View.** — In the work on Statutory Crimes, the topic of the present sub-title is somewhat discussed.[7] There are, in the several States, statutes against the burning of shops, dwell-

[1] Roberts, C. J., in Delany *v.* The State, supra, at p. 604.

[2] Vol. I. § 337–341.

[3] Reg. *v.* Regan, 4 Cox C. C. 335.

[4] Vol. I. § 734, 735.

[5] Rex *v.* Cooper, 5 Car. & P. 535. And see Reg. *v.* Price, 9 Car. & P. 729; Reg. *v.* Fletcher, 2 Car. & K. 215; The State *v.* Laughlin, 8 Jones, N. C. 354; Overstreet *v.* The State, 46 Ala. 30.

[6] Holmes's Case, Cro. Car. 376, W. Jones, 351; Rex *v.* Pedley, Cald. 218, 2 East P. C. 1026; Rex *v.* Schofield, Cald. 397.

[7] Stat. Crimes, § 536 et seq., and at other places.

ing-houses,[1] and the like; but the common-law rules concerning arson are ordinarily sufficient guides in their interpretation.[2] Thus, where an act of the Connecticut legislature provided a punishment for "every person who shall wilfully burn, being the *property of another*, any ship or other vessel, any office, store, shop," &c., the court decided, following the common-law rule concerning arson, that a mere special property in the person alleged to be the owner is enough.[3]

[1] Stat. Crimes, § 289 et seq.

[2] Stat. Crimes, § 139–141, 242, 268.

[3] The State *v.* Lyon, 12 Conn. 487. Let us look at a few points adjudged under statutes: —

Inhabited Dwelling. — In Georgia, a house from which the occupants are temporarily absent, while their effects remain, has been deemed to be an occupied dwelling-house, within a statute against arson. Johnson *v.* The State, 48 Ga. 116. But in New York, where a statute provided that one convicted of "wilfully burning any *inhabited* dwelling" shall suffer death; the court, in construing it, observed: "By the addition of the word 'inhabited,' the legislature evidently intended to make a distinction between the act of burning a dwelling-house when persons were actually in it at the time, and burning an uninhabited dwelling-house; the one offence being punishable by death, and the other by imprisonment." It was held, however, that the burning need only be the common-law burning, it not being necessary that the entire building should be consumed. People *v.* Butler, 16 Johns. 203, 204. In a later New York case, where the offence alleged was arson of the first degree, which, by the statute, "consists in wilfully setting fire to, or burning, in the night-time, a dwelling-house in which there shall be at the time some human being; and every house, prison, jail, or other edifice, which shall have been usually occupied by persons lodging therein at night, shall be deemed a dwelling-house of any person so lodging therein;" it was held by the majority of the court, one judge dissenting, that, contrary to the common-law rule, a man may commit this offence of statutory arson in the first degree by burning his own house. Shepherd *v.* People, 19 N. Y. 537, 540; overruling a dictum in People *v.* Gates, 15 Wend. 159, and the decision in People *v.* Henderson, 1 Parker, 560.

In one's own Occupation. — We have seen (ante, § 12), that under various statutes one may commit arson of his own house. So in Ohio, a tenant may commit arson of the premises he occupies, by force of a statute which has superseded the common law. The statute is: "If any person shall wilfully and maliciously burn, &c., any dwelling-house, &c., &c., every person so offending shall be deemed guilty of arson." It will be remembered, that there are no common-law offences in Ohio. Vol. I. § 35. Said Sutliff, J.: "Our statute against the burning of buildings is not confined to the common-law offence of arson, or felonious burning. It seems to comprehend that kind of burning, which, at common law, constituted merely a high misdemeanor, as well as those which were arson, or felonies, at common law." Allen *v.* The State, 10 Ohio State, 287, 302.

Time of the Burning. — At common law, the burning is equally arson whether done in the night or day. Herein this offence differs from burglary. But, in some of the States, there are statutes which make a burning in the night a heavier crime than in the day. Brooks *v.* The State, 51 Ga. 612; Commonwealth *v.* Horrigan, 2 Allen, 159; Commonwealth *v.* Flynn, 3 Cush. 525.

Other Provisions. — As to other statutes, see The State *v.* Mitchell, 5 Ire. 350; People *v.* Van Blarcum, 2 Johns. 105; People *v.* Cotteral, 18 Johns. 115; Commonwealth *v.* Posey, 4 Call, 109; Commonwealth *v.* Curran, 7 Grat. 619; Commonwealth *v.* Erskine, 8 Grat. 624; Commonwealth *v.* Van Shaack, 16 Mass.

VI. *Remaining and Connected Questions.*

§ 18. **Degree of Crime and Punishment.** — Arson is a common-law felony;[1] punishable, therefore, originally with death. But it is now dealt with more mildly in most of the States, as the reader will see on referring to the statutes.[2] The other burnings mentioned are of such degree of crime, and subject to such pun ishment, as the particular legislative act, or the general statutory law of the State prescribes.[3]

§ 19. **Degrees.** — The statutes of New York divide arson into four degrees; but it is not necessary to explain them here. This is a provision of a kind, which, in most of the States, is constantly shifting.[4]

§ 20. **Attempts.** — According to principles laid down in the preceding volume,[5] an attempt to commit arson or a statutory burning is an indictable misdemeanor.[6] Thus, to solicit another to perpetrate such an offence, though the one soliciting does not intend to be present, and the offence is not in fact committed, is indictable as an attempt.[7] So is the burning of one's own house

105; Commonwealth *v.* Squire, 1 Met. 258; The State *v.* O'Brien, 2 Root, 516; Jones *v.* Hungerford, 4 Gill & J. 402; Wallace *v.* Young, 5 T. B. Monr. 155; Rex *v.* Taylor, 1 Leach, 4th ed. 49, 2 East P. C. 1020; Rex *v.* Judd, 1 Leach, 4th ed. 484, 2 T. R. 255, 2 East P. C. 1018; Rex *v.* March, 1 Moody, 182; Reg. *v.* Clayton, 1 Car. & K. 128; Reg. *v.* Paice, 1 Car. & K. 73; The State *v.* Taylor, 45 Maine, 322.

[1] 3 Inst. 66; 2 East P. C. 1015; 1 Hale P. C. 566, 570; Sampson *v.* Commonwealth, 5 Watts & S. 385.

[2] See Vol. I. § 615, 616, 933, 939. As to South Carolina, see The State *v.* Bosse, 8 Rich. 276; as to North Carolina, The State *v.* Seaborn, 4 Dev. 305; as to Virginia, Commonwealth *v.* Posey, 4 Call, 109; as to the District of Columbia, United States *v.* White, 5 Cranch, C. C. 73; as to Massachusetts, Commonwealth *v.* Wyman, 12 Cush. 237.

[3] See Vol. I. § 611–623.

[4] See the proposed Penal Code of New York, reported by Field and others, commissioners, A. D. 1864, p. 191–193; ante, § 14, note. "**Adjoining.**" — A statute providing that the firing of a building not the subject of arson in the first degree, but adjoining to or within the curtilage of a dwelling-house, shall be arson in the second degree; the court held, that the word "adjoining" means in actual contact with. Peverelly *v.* People, 3 Parker, 59.

[5] Vol. I. § 224, 723 et seq.

[6] 1 Hale P. C. 568; Commonwealth *v.* Flynn, 8 Cush. 525; Reg. *v.* Clayton, 1 Car. & K. 128.

[7] People *v.* Bush, 4 Hill, N. Y. 133. This case was, indeed, decided under a statute, which exists in several other States as well as in New York, providing that "every person who shall attempt to commit an offence prohibited by law, and in such attempt shall do any act towards the commission of such offence, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, shall," &c.; yet this statute is itself only declaratory of the common law. See Vol. I. § 743; Reg. *v.* Clayton, 1 Car. & K. 128.

with the intent thereby to consume another's, though the other's house be not in fact burned.[1] And if one lights a match to set the fire, but abandons the undertaking on discovering that he is watched, he commits the indictable attempt.[2]

§ 21. **The Intent in Attempt — "To the Terror of the Inhabitants" — Public Nuisance.** — We have seen,[3] that, to constitute an attempt, strictly speaking, there must be the intent in fact, as distinguished from a mere intent in law, to do the particular thing. But the books say, that, if one, to the terror of the inhabitants, burns his own house contiguous to other houses, he commits thereby an indictable misdemeanor.[4] The principle on which this conclusion rests, probably is, that the act of burning is a public nuisance, and not merely an attempt to commit arson; though the like conclusion might, under the facts of some cases, be sustained on the latter, as well as on the former, ground. When the act is viewed as a nuisance, however, there is no necessity that the person should really mean to burn any other house than his own.

[1] Holmes's Case, Cro. Car. 376, W. Jones, 351.

[2] Reg. *v.* Taylor, 1 Fost. & F. 511; The State *v.* Johnson, 19 Iowa, 230.

[3] Vol. I. § 727–735.

[4] 2 East P. C. 1027; Rex *v.* Proberts, 2 East P. C. 1030; Rex *v.* Isaac, 2 East P. C. 1031.

For ASSEMBLY UNLAWFUL, see UNLAWFUL ASSEMBLY.

CHAPTER III.

ASSAULT.[1]

§ 22–24. Introduction.
25–29. The Force as being Physical.
30, 31. The same as being put in Motion.
32–34. The Peril or Fear it creates.
35, 36. Effect of consenting to the Force.
37–41. The Force as being Unlawful.
42–54. Aggravations of the Offence.
55–62. Remaining and Connected Questions.

§ 22. **Scope of this Chapter.** — The two offences of assault and battery are usually treated of in the books together, under the double title "Assault and Battery." And the present author, in his work on Criminal Procedure, treated of the pleading, practice, and evidence relating to these offences in this way. But the law of the subject may be simplified by considering "Assault" first and "Battery" afterward. Still, under this single title Assault, most of what is usually placed under the double title will be here discussed.

§ 23. **How defined.** — An assault is any unlawful physical force, partly or fully put in motion, creating a reasonable apprehension of immediate physical injury to a human being:[2] as, raising a

[1] For matter relating to this title, see Vol. I. § 413, note, 422, 470, 548–550, 553, 686, 736, 746, 748, 788, 795, 808, 809, 881, 882, 887, 891, 1061. See this volume, BATTERY. For the procedure, see Crim. Proced. II. § 54 et seq. And see the discussions in Stat. Crimes, § 216, 463, 480–493, 500–508, 511–514, 518, 560, 568, 751, 752.

[2] Vol. I. § 548. The books contain various —

Other Definitions. — "It seems," says Hawkins, "that an assault is an attempt, or offer, with force and violence, to do a corporal hurt to another: as, by striking at him with or without a weapon; or presenting a gun at him at such distance to which the gun will carry; or pointing a pitchfork at him, standing within the reach of it; or by holding up one's fist at him; or by any other such like act, done in an angry, threatening manner." 1 Hawk. P. C. Curw. ed. p. 110, § 1. This definition has been generally followed by later writers. See also Johnson *v.* Tompkins, Bald. 571, 600; The State *v.* Malcolm, 8 Iowa, 413. In an Alabama case, Stone, J., said: "An assault is an attempt, or offer, to do another personal violence, without actually accomplishing it. A menace is not an assault; neither is a conditional offer of violence. There must be a present intention to strike." Johnson *v.* The State, 35 Ala. 363, 365. Another learned Alabama judge once observed: "To con

cane to strike him; pointing, in a threatening manner, a loaded gun at him; and the like.

§ 24. **How the Chapter divided.** — We shall consider, I. The Force as being Physical; II. The Force as being put in Motion; III. The Peril or Fear it creates; IV. The Effect of consenting to the Force; V. The Force as being Unlawful; VI. Aggravations of the Offence; VII. Remaining and Connected Questions.

stitute an assault, there must be the commencement of an act, which, if not prevented, would produce a battery." Walker, J., in Lawson *v.* The State, 30 Ala. 14. Again: "An assault is any attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness, with such circumstances as denote, at the time, an intention to do it, coupled with a present ability to carry such intention into effect." Peck, C. J., in Tarver *v.* The State, 43 Ala. 354, 356. We have likewise the following: "The definition of an assault is an offer or attempt, by force, to do a corporal injury to another; as, if one person strike at another with his hands, or with a stick, and misses him; for, if the other be stricken, it is a battery, which is an offence of a higher grade." Washington, J., in United States *v.* Hand, 2 Wash. C. C. 435, 437. "An assault is an intentional attempt, by violence, to do an injury to the person of another. It must be intentional; for, if it can be collected, notwithstanding appearances to the contrary, that there is not a *present* purpose to do an injury, there is no assault. . . . And it must also amount to an attempt; for a purpose to commit violence, however fully indicated, if not accompanied by an effort to carry it into immediate execution, falls short of an actual assault." Gaston, J., in The State *v.* Davis, 1 Ire. 125, 127. And the learned judge goes on to say: "It is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed; for, until the execution of it is begun, there can be no assault. We think, however, that, where an unequivocal purpose of violence is accompanied by an *act*, which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, and the battery is *attempted*." p. 127. In a California case, Sanderson, C. J., said: "In order to constitute an assault, there must be something more than a mere menace. There must be violence begun to be executed. But where there is a clear intent to commit violence, accompanied by acts which, if not interrupted, will be followed by personal injury, the violence is commenced, and the assault is complete." People *v.* Yslas, 27 Cal. 630, 633. In The State *v.* Gorham, 55 N. H. 152, my own definition, in the text, was adopted.

A better but not permissible Definition. — If it were competent for a text-writer to give new shape to the law, I should, after defining a battery, say: An assault is any indictable attempt to commit a battery. We could then resort to the doctrine of attempt, as defined in our previous volume, for the settlement of undecided points respecting assault. If this definition were adopted, it would not make any thing indictable which is not so now; but it would probably bring within the title "assault" some acts, which, though now punishable by the criminal law, have not hitherto been known by this name. The New York commissioners, in their proposed Penal Code, give a definition which comes very near the one which I thus recommend. It is as follows: "An assault is any wilful and unlawful attempt or offer, with force or violence, to do a corporal hurt to another." Draft of a Penal Code, p. 105. But a text-writer is not permitted to take such liberties. He must adhere to the divisions of the law as he finds them already drawn, — not do as he would draw them were he framing an original code.

I. *The Force as being Physical.*

§ 25. **Words alone.** — The force must be physical. Or, as expressed by Hawkins, "notwithstanding the many ancient opinions to the contrary,[1] it seems agreed at this day that no words whatsoever can amount to an assault."[2] Even a threat is not such, if unaccompanied by an attempt or offer to strike.[3] Yet —

Words with Conduct. — Words may explain and give character to physical acts;[4] and may so combine with circumstances as to make that an assault which, without them, would not be such.[5] For example, —

§ 26. **Arrest — False Imprisonment.** — As, to constitute an arrest the party need not be touched by the officer,[6] it being sufficient if he is commanded to give himself up and does; so there may be a false imprisonment, understood to include in law an assault,[7] without direct physical contact. Such is the doctrine in the civil suit for false imprisonment,[8] and equally in the criminal.[9] Thus, in a criminal case for false imprisonment, in which the defendant was not an officer, the Tennessee court held, that the

[1] Pulton, who wrote more than two hundred years ago, said: "He that is wronged in his own person, his servants, or tenants, by the menace of another, whereby he suffereth loss, shall have his action of trespass against the offender for the said menace and the hurt which he receiveth thereby; and the king also shall have a fine of the offender, for that the menace was of life and member, and suggested to be done *vi et armis*, and so tended to the breach of the peace. But if it be such a menace as doth not tend to the breach of the peace, then the law is otherwise; for then the party menaced shall neither have an action of trespass or other remedy against the menacer, neither shall the king have a fine of him. . . . As menace in words is accounted in many cases to be a mean of the breach of the peace, and so punishable by the laws of the realm; so menace by deeds, by behavior, gesture, wearing of armor, or unusual and extraordinary number of servants or attendants, is accounted to be in affray and fear of the people, a mean of the breach of the peace, and so punishable." Pulton de Pace, ed. of 1615, 3 *b*. 4.

[2] 1 Hawk. P. C. Curw. ed. p. 110, § 1; People *v.* Bransby, 32 N. Y. 525, 532; Warren *v.* The State, 33 Texas, 517; Smith *v.* The State, 39 Missis. 521; The State *v.* Milsaps, 82 N. C. 549; ante, § 3.

[3] The State *v.* Mooney, Phillips, 434; Smith *v.* The State, 39 Missis. 521.

[4] The State *v.* Crow, 1 Ire. 375; Commonwealth *v.* Eyre, 1 S. & R. 347; The State *v.* Baker, 65 N. C. 332; Colquitt *v.* The State, 34 Texas, 550.

[5] Post, § 34; The State *v.* Rawles, 65 N. C. 334; The State *v.* Shipman, 81 N. C. 513.

[6] Gold *v.* Bissell, 1 Wend. 210, 215; United States *v.* Benner, Bald. 234. As to what constitutes an arrest, and how it is made, see Crim. Proced. I. § 155 et seq.

[7] 1 Russ. Crimes, 3d Eng. ed. 753; 1 Gab. Crim. Law, 82; post, § 747.

[8] Pike *v.* Hanson, 9 N. H. 491; Homer *v.* Battyn, Buller's N. P. 62; 2 Kent Com. 26; Bird *v.* Jones, 7 Q. B. 742.

[9] Vol. I. § 560–564, 587; post, § 748. And see 1 Russ. Crimes, 3d Eng. ed. 754, Long *v.* Rogers, 17 Ala. 540.

physical touch is not requisite to the offence; and suffered to remain unreversed a conviction against him for detaining the prosecutor on board the defendant's ferry-boat, by words and threats alone, for the purpose of compelling payment of toll not due.[1]

§ 26 *a*. **Continued — (Present abetting).** — A man may, in assault, the same as in any other crime, by mere words make himself a principal in the second degree, should the assault be under circumstances of such aggravation as to be a felony; or the equivalent of such principal where it is a misdemeanor.[2] Thus, if one of a tumultuous crowd, seeing a police officer attacked, encourages the assailants by words, he becomes guilty of the assault which the others personally inflict.[3]

§ 27. **Standing Passive, &c.** — But to stand passively, like an inanimate object, — "like a door or wall," — and thus obstruct the going of another into a room which he has the right to enter, does not, as observed by Lord Denman, C. J., in an English case, constitute an assault.[4] Yet, in Tennessee a defendant was held to have committed an assault, who, with an open knife in his hand, and within striking distance of a man, stopped him in the public way, and threatened him till he delivered up a marriage license demanded.[5]

§ 28. **Different Kinds of Physical Force.** — If, however, there is actual physical force, its particular kind is immaterial.[6] Thus, not only is the raising of the hand or a weapon to strike, which is a common illustration, an assault; but so is also the pointing of a gun or pistol at the person within shooting distance;[7] the reckless riding of a horse so near him as to create a reasonable apprehension of personal danger;[8] the cutting off of the hair of a female pauper in a poor-house by force and against her will;[9] the taking of indecent liberties with a woman;[10] even laying hold

[1] Smith *v.* The State, 7 Humph. 43. And see The State *v.* Rollins, 8 N. H. 550; Bird *v.* Jones, 7 Q. B. 742.

[2] Vol. I. § 629 et seq., 648, 656, 685, 686.

[3] Commonwealth *v.* Hurley, 99 Mass. 433.

[4] Inness *v.* Wylie, 1 Car. & K. 257

[5] Bloomer *v.* The State, 3 Sneed, 66. See also The State *v.* Taylor, 3 Sneed, 662; The State *v.* Benedict, 11 Vt. 236.

[6] See Vol. I. § 548, 553.

[7] Genner *v.* Sparks, 6 Mod. 173, Anonymous, 1 Vent. 256; Blake *v.* Barnard, 9 Car. & P. 626; Morison's Case, 1 Broun, 394.

[8] The State *v.* Sims, 3 Strob. 137; Morton *v.* Shoppee, 3 Car. & P. 373; People *v.* Lee, 1 Wheeler Crim. Cas. 364.

[9] Forde *v.* Skinner, 4 Car. & P. 239.

[10] Rex *v.* Nichol, Russ. & Ry. 130.

of and kissing her against her will;[1] recklessly whipping a pony, it has been held in Scotland, so as to make the animal run away with its rider, and throw him, or fall with him;[2] or perhaps the putting of a deleterious drug into the drink of another, if he actually takes it to his injury,[3] — in some of which illustrations the thing done includes also a battery.[4] And "there may be an assault by encouraging a dog to bite; by riding over a person with a horse; or by wilfully and violently driving a cart, &c., against the carriage of another person, and thereby causing bodily injury to the persons travelling in it."[5]

§ 29. **Neglect, Abandonment, &c.** — While it is indictable simply to neglect or refuse to provide food and clothing for one, in pursuance of a legal duty, whereby he suffers injury,[6] this is possibly not a technical assault in law. But an assault appears to be committed[7] where the party so exposes such one to the inclemency of the weather — as, for instance, so abandons a child whom he is under legal obligation to maintain — that injurious consequences follow.[8] The Scotch doctrine, contrary to the English, seems not to require any actual evil consequences following.[9]

[1] Reg. *v.* Dungey, 4 Fost. & F. 99, 103.

[2] Keay's Case, 1 Swinton, 543. And see Dodwell *v.* Berford, 1 Mod. 24; Anonymous, W. Jones, 444; Green *v.* Goddard, 2 Salk. 641; Kirland *v.* The State, 43 Ind. 146.

[3] So held by Serg. Arabin, after consulting with the Recorder, in Reg. *v.* Button, 8 Car. & P. 660; but the doctrine was afterward overruled at nisi prius, in Reg. *v.* Walkden, 1 Cox C. C. 282; Reg. *v.* Dilworth, 2 Moody & R. 531; and Reg. *v.* Hanson, 2 Car. & K. 912. See also Edsall *v.* Russell, 6 Jur. 996, 999. On principle, where, under the circumstances mentioned in these cases, the intent and the act are together sufficiently evil in degree for the criminal law to notice, see Vol. I. § 760, no good reason appears why the offence should not be deemed an assault, and also a battery.

[4] In a civil action it has been held, that trespass lies for an injury sustained by firing a gun, and thereby frightening the plaintiff's horse, if the defendant had reasonable ground to believe the firing would produce the fright. Cole *v.* Fisher, 11 Mass. 137.

[5] 1 Russ. Crimes, 3d Eng. ed. 751, citing Crown Circ. Comp. 82; 3 Chit. Crim Law, 823, 825; 2 Stark. Crim. Pl. 388, 389, 2d ed. 406 et seq. **Torture.** — Torture to extort confessions is indictable at the common law, — doubtless as an assault, though it may include also a false imprisonment. The State *v.* Hobbs, 2 Tyler, 380.

[6] Vol. I. § 557; Rex *v.* Friend, 1 Russ. Crimes, 3d Eng. ed. 46, Russ. & Ry. 20; Reg. *v.* Phillpot, 20 Eng. L. & Eq. 591; Reg. *v.* Hogan, 2 Den. C. C. 277, 5 Eng. L. & Eq. 553. And see Reg. *v.* Troy, 1 Crawf. & Dix C. C. 556; Reg. *v.* Pelham, 8 Q. B. 959; Commonwealth *v.* Stoddard, 9 Allen, 280. And see, as to the neglect of an overseer to provide for a pauper, Rex *v.* Warren, Russ. & Ry. 47, note; Rex *v.* Meredith, Russ. & Ry. 46; Rex *v.* Booth, Russ. & Ry. 47, note.

[7] Vol. I. § 884.

[8] Rex *v.* Ridley, 1 Russ. Crimes, 3d Eng. ed. 752, 2 Camp. 650, 653. And see Reg. *v.* Mulroy, 3 Crawf. & Dix C. C. 318; Reg. *v.* Renshaw, 20 Eng. L. & Eq. 593, 2 Cox C. C. 285, 11 Jur. 615. See post, § 33.

[9] 1 Alison Crim. Law, 162. And see, on this point, Reg. *v.* March, 1 Car. & K. 496.

II. *The Force as being put in Motion.*

§ 30. **General Doctrine.** — In the next place, there is no assault unless the physical force is actually put in motion; neither is there an assault unless the force is of such a sort and proceeds so far as to render the peril, either in fact or in appearance, imminent and immediate.[1] There must be "violence begun to be executed," in distinction from violence menaced.[2]

§ 31. **Illustrations — (Presenting Pistol — Rushing on, &c.)** — Therefore it has been held, that merely to draw a pistol, without presenting or cocking it, comes short of an assault.[3] Yet one who rushes upon his adversary to strike, though not near enough for the blow to take effect, commits the offence; provided he is sufficiently near to create in a person of ordinary firmness a fear of immediate violence unless he strikes in self-defence.[4] And a man who was advancing with clenched fist to beat another, but was stopped by persons present a second or two before he got within reach, was held, by Tindal, C. J., to have committed an assault.[5]

III. *The Peril or Fear.*

§ 32. **Actual Peril — Apprehended.** — There is no need for the party assailed to be put in actual peril, if only a well-founded apprehension is created. For his suffering is the same in the one case as in the other, and the breach of the public peace is the same.[6]

Illustrations — (Pointing Gun not loaded — Not within Shooting distance.) — Therefore, if, within shooting distance, one menacingly points at another with a gun, apparently loaded, yet not loaded in fact, he commits an assault the same as if it were loaded.

[1] Vol. I. § 548.

[2] Gaston, J., in The State *v.* Davis, 1 Ire. 125.

[3] Lawson *v.* The State, 30 Ala. 14. See Higginbotham *v.* The State, 23 Texas, 574. The circumstances may be such, however, that this will be an assault. The State *v.* Church, 63 N. C. 15.

[4] The State *v.* Davis, 1 Ire. 125; People *v.* Yslas, 27 Cal. 630.

[5] Stephens *v.* Myers, 4 Car. & P. 349. To the like effect is The State *v.* Vannoy, 65 N. C. 532. And see Morton *v.* Shoppee, 3 Car. & P. 373.

[6] See Vol. I. § 548; The State *v.* Hampton, 63 N. C. 13; Keefe *v.* The State, 19 Ark. 190; Smith *v.* The State, 32 Texas, 393.

There must in such a case be some power, actual or apparent, of doing bodily harm; but apparent power is sufficient.[1] In the instances we are referring to, the person assaulted is really put in fear. So in a Scotch case it was said: "The presenting of a pistol, even if it were not loaded, provided the party at whom it was presented supposed it to be loaded, was undoubtedly in law an assault."[2] It has been said that the gun must be within shooting distance;[3] but plainly if it is not, yet seems to be so to the person assaulted, or danger otherwise appears imminent, that will be sufficient.[4]

§ 33. **Injury without Fear.** — On the other hand, though no fear is created, if an injury is inflicted it is sufficient;[5] for where there is a battery there is an assault.[6]

Illustrations — (Abandoning Child — Assault proceeding to Battery or not). — Thus, where, in England, a woman was delivered of a child at the house of the defendants, who told her they would take it to an institution to be nursed, instead of which they put it in a bag and hung it on some park-palings at the side of a foot-path, and there left it, — Tindal, C. J., ruled, that they were guilty of assaulting the child; though plainly it could have no knowledge of what was done.[7] There was battery, therefore also an assault. And we may doubt, whether, if there is neither any person put in fear, nor any injury done, the transaction being a mere private one, and not in any public place, the act, however adapted in its nature to produce harm, can constitute an assault; since there has been created neither personal suffering nor a

[1] Beach *v.* Hancock, 7 Fost. N. H. 223; The State *v.* Smith, 2 Humph. 457; Reg. *v.* St. George, 9 Car. & P. 483; The State *v.* Shepard, 10 Iowa, 126. As once observed: "It is not the secret intent of the assaulting party, nor the undisclosed fact of his ability or inability to commit a battery, that is material; but what his conduct and the attending circumstances denote at the time to the party assaulted. If to him they indicate an attack, he is justified in resorting to defensive action. The same rule applies to the proof necessary to sustain a criminal complaint for an assault. It is the outward demonstration that constitutes the mischief which is punished as a breach of the peace." Wells, J., in Commonwealth *v.* White, 110 Mass. 407, 409. Contra, Blake *v.* Barnard, 9 Car. & P. 626; and perhaps Vaughan *v.* The State, 3 Sm. & M. 553; Shaw *v.* The State, 18 Ala. 547. Quære, The State *v.* Cherry, 11 Ire. 475. And see The State *v.* Sims, 3 Strob. 137; The State *v.* Crow, 1 Ire. 375; The State *v.* Blackwell, 9 Ala. 79; Crow *v.* The State, 41 Texas, 468; Agitone *v.* The State, 41 Texas, 501; Vol. I. § 738–750.

[2] Morison's Case, 1 Broun, 394, 395.

[3] Tarver *v.* The State, 43 Ala. 354.

[4] See, as illustrative, The State *v.* Vannoy, 65 N. C. 532; The State *v.* Rawles, 65 N. C. 334; People *v.* Yslas, 27 Cal. 630.

[5] The State *v.* Gorham, 55 N. H. 152.

[6] Vol. I. § 548; post, § 56, 71.

[7] Reg. *v.* March, 1 Car. & K. 496.

breach of the public peace.[1] But on this point we have probably no direct adjudications; and, opposed to the view suggested, there is some ground of principle for looking at the act in the light, at least, of an indictable attempt to commit a battery.[2]

§ 34. **Words explaining away Act.** — If a man does what would ordinarily amount to an assault, but accompanies the doing with words which show that he has no intention of inflicting a battery, and there is no real or apparent danger,[3] — as, if he shakes his whip over one and says, "were you not an old man, I would knock you down;"[4] or lays his hand on his sword, saying, "If it were not assize time, I would not take such language from you,"[5] — he does not become chargeable with this offence. Where, however, a person within striking distance raised a weapon, and told another to do a particular thing, and then he would not strike, which thing being done no blow was given, the assault was held to be complete.[6] The same was ruled, where the defendant doubled up his fist at another, and said, "If you say so again, I will knock you down."[7] For in assault there is a real or apparent attempt to do personal violence.[8]

IV. *The Effect of consenting to the Force.*

§ 35. **General Doctrine — Exceptions — (Indecent Assault — Prize-Fight.)** — We saw, in the preceding volume, that, if one consents to be beaten, the person who inflicts the battery is not ordinarily chargeable with an offence; the limit to this doctrine being, that the beating must be one to which the party has the right to consent.[9] If, therefore, a woman consents to her own dishonor, however immoral the act, her ravisher does not thus commit an assault.[10] No concurrence of wills can justify a

[1] See, as confirming this view, the doctrine stated ante, § 29, of the exposure of infants, &c., where no injury has come to them.

[2] See ante, § 23, note; post, § 62; Vol. I. § 738–750.

[3] Blake *v.* Barnard, 9 Car. & P. 626.

[4] The State *v.* Crow, 1 Ire. 375; Commonwealth *v.* Eyre, 1 S. & R. 347.

[5] Tuberville *v.* Savage, 1 Mod. 3; s. c. nom. Tubervell *v.* Savadge, 2 Keb. 545; 1 Russ. Crimes, 3d Eng. ed. 750.

[6] The State *v.* Morgan, 3 Ire. 186. And see Read *v.* Coker, 24 Eng. L. & Eq. 213.

[7] United States *v.* Myers, 1 Cranch C. C. 310. s. p. United States *v.* Richardson, 5 Cranch C. C. 348.

[8] The State *v.* Blackwell, 9 Ala. 79.

[9] Vol. I. § 260–262 and note. And see Pillow *v.* Bushnell, 5 Barb. 156; Commonwealth *v.* Collberg, 119 Mass. 350.

[10] People *v.* Bransby, 32 N. Y. 525, 529; Reg. *v.* Cockburn, 3 Cox C. C. 543; Reg. *v.* Wollaston, 12 Cox C. C. 180, 2 Eng. Rep. 234.

public tumult and alarm; therefore persons who voluntarily engage in a prize-fight, and their abettors, are all guilty of assault.[1]

§ 36. **Fraud in obtaining Consent.** — We saw, also, that consent obtained by fraud, or other overpowering of the will of the injured one, does not avail the other.[2] And slight facts are in some circumstances sufficient to show the will to have been overpowered.

Illustrations — (Teacher and Pupil — Indecent Liberties — Physician and Patient.) — Thus, if a schoolmaster takes indecent liberties with a female pupil who does not resist, her tender years and relative subjection to him may justify a jury, heeding her testimony that what was done was really against her wishes, in pronouncing him guilty.[3] Likewise, where a medical practitioner had a sexual connection with a girl of fourteen, his patient, who forbore resistance under the belief that he was treating her medically, as he represented himself to be, the English judges held him guilty of an assault. And Wilde, C. J., said, it was properly not left to the jury to find, whether he really believed he was curing her; for "the notion, that a medical man may lawfully adopt such a mode of treatment, is not to be tolerated in a court of justice."[4] But where, no such relationship existing, a girl nine years old consented, according to the finding of the jury, to sexual commerce with some boys, "from her tender age not knowing what she was about," the court refused to sustain a conviction of the boys for assault.[5]

V. *The Force as being Unlawful.*

§ 37. **General Doctrine — (Mariners — Defence of Property, &c. — Arrest — Bail — Removing Railway Passenger).** — Finally, the force must be unlawful. Any violence, therefore, which, from

[1] Rex *v.* Perkins, 4 Car. & P. 537; Rex *v.* Hunt, 1 Cox C. C. 177. And see Rex *v.* Billingham, 2 Car. & P. 234; Reg. *v.* Brown, Car. & M. 314. But see Duncan *v.* Commonwealth, 6 Dana, 295.

[2] Vol. I. § 262.

[3] Rex *v.* Nichol, Russ. & Ry. 130; 1 Bennett & Heard Lead. Cas. 513, and see the note of Mr. Heard. And see Reg. *v.* Lock, Law Rep. 2 C. C. 10.

[4] Reg. *v.* Case, 1 Eng. L. & Eq. 544, Temp. & M. 318, 1 Den. C. C. 580, 4 New Sess. Cas. 347, 14 Jur. 489, 4 Cox C. C. 220. See also, as to the relation of physician and patient, Rex *v.* Rosinski, 1 Moody, 19; Reg. *v.* Ellis, 2 Car. & K. 470.

[5] Reg. *v.* Read, 1 Den. C. C. 377, 2 Car. & K. 957, Temp. & M. 52, 3 New Sess. Cas. 405, 13 Jur. 68. And see Reg. *v.* Martin, 9 Car. & P. 213, 2 Moody, 123; Reg. *v.* Johnson, Leigh & C. 632, 10 Cox C. C. 114. As to kidnapping a child under ten years of age, see The State *v.* Rollins, 8 N. H. 550.

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the relations of the parties or otherwise, one has the right to inflict on the other, — as, in the exercise of discipline in the naval and merchant services;[1] in the defence of one's person or property;[2] in the making of arrests, by those lawfully empowered, and in the detaining of persons arrested;[3] in taking possession, by bail, of those under bail;[4] in the exclusion or removal, by the conductor of a railway train, of a person whom he has a right under the circumstances to exclude or remove;[5] in resisting an unlawful arrest,[6] — is not deemed an assault.[7]

§ 38. **Carrying Lawful Force too Far — (Chastisement, &c.)** — But if a person, in thus doing what he has a right to do, proceeds too far, — as, if he inflicts legal chastisement to an illegal extent, — he becomes guilty of an assault.[8] And, generally, any excess of authorized force will be criminal.[9]

§ 39. **Defence in itself Unlawful — (Resisting Arrest — Co-tenant.)** — Especially, therefore, if by personal violence a man undertakes a defence when he has no right to make any, of himself or property,[10] — as, where he resists by such violence a lawful

[1] Wilkes *v.* Dinsman, 7 How. U. S. 89; Hannen *v.* Edes, 15 Mass. 347; Broughton *v.* Jackson, 11 Eng. L. & Eq. 386; Brown *v.* Howard, 14 Johns. 119; Sampson *v.* Smith, 15 Mass. 365; United States *v.* Wickham, 1 Wash. C. C. 316; United States *v.* Taylor, 2 Sumner, 584; United States *v.* Ruggles, 5 Mason, 192. Flogging is now forbidden by United States statute in the army, the navy, in military prisons, and on board vessels of commerce. Rev. Stats. of U. S. p. 239, 243, 283, 900.

[2] The State *v.* Briggs, 3 Ire. 357; Rex *v.* Milton, Moody & M. 107; s. c. nom. Rex *v.* Mitton, 3 Car. & P. 31; The State *v.* Elliot, 11 N. H. 540; The State *v.* Gibson, 10 Ire. 214; The State *v.* Quin, 3 Brev. 515; Commonwealth *v.* Clark, 2 Met. 23; Yoes *v.* The State, 4 Eng. 42; McIlvoy *v.* Cockran, 2 A. K. Mar. 271, 274; Robinson *v.* Hawkins, 4 T. B. Monr. 134; Baldwin *v.* Hayden, 6 Conn. 453; Causee *v.* Anders, 4 Dev. & Bat. 246; United States *v.* Liddle, 2 Wash. C. C. 205; United States *v.* Ortega, 4 Wash. C. C. 531; Alderson *v.* Waistell, 1 Car. & K. 358; Corey *v.* People, 45 Barb. 262.

[3] The State *v.* Stalcup, 2 Ire. 50; Harrison *v.* Hodgson, 10 B. & C. 445, 5 Man. & R. 392; Rex *v.* Kelly, 1 Crawf. & Dix C. C. 203; Rex *v.* Milton, supra; Mitchell *v.* The State, 7 Eng. 50; Frost *v.* Thomas, 24 Wend. 418; Wasson *v.* Canfield, 6 Blackf. 406.

[4] The State *v.* Mahon, 3 Harring. Del. 568.

[5] People *v.* Caryl, 3 Parker, 326; People *v.* Jillson, 3 Parker, 234; The State *v.* Ross, 2 Dutcher, 224.

[6] The State *v.* Hooker, 17 Vt. 658; People *v.* Gulick, Hill & Denio, 229.

[7] **Innkeeper.** — An innkeeper has no right to take clothes or goods from the person of a guest, or to detain the guest in order to secure payment for his bill Sunbolf *v.* Alford, 3 M. & W. 248, 2 Jur. 110.

[8] Hannen *v.* Edes, 15 Mass. 347; Commonwealth *v.* Randall, 4 Gray, 36.

[9] Scribner *v.* Beach, 4 Denio, 448; Likes *v.* Dike, 17 Ohio, 454; Bartlett *v.* Churchill, 24 Vt. 218; French *v.* Marstin, 4 Fost. N. H. 440; Boles *v.* Pinkerton, 7 Dana, 453; The State *v.* Ross, 2 Dutcher, 224; Golden *v.* The State, 1 S. C. 292, 302; Commonwealth *v.* Dougherty, 107 Mass. 243.

[10] As to what defence a man may

arrest,[1] or thus prevents a co-tenant from going upon the common estate,[2] — he commits an assault.

§ 40. **Words not justify Assault.** — Mere words from one will not justify a physical attack upon him;[3] even threats, antecedently made, will not authorize an assault in the absence of any demonstration showing an intent to carry the threats into execution.[4] But words may be important when considered in connection with acts.[5] And in Alabama, by force of a statute, opprobrious words will in some circumstances justify an assault and battery.[6]

Character bad. — Plainly, it is no justification for assaulting one that his character is bad.[7]

§ 41. **When Violence justifies Assault.** — But where violence is used toward person or property, it may sometimes be returned by violence;[8] and even an assault will, under some circumstances, not all, justify a battery.[9] The person beset is permitted to act only in self-defence; he cannot take the law into his own hands to inflict punishment for the injury.[10] Therefore, if he strikes when all danger is past, he is guilty.[11] And where a woman asked a man who was riding by on horseback why he had talked about her, and then threw at him first a stone and next a stick, whereupon he dismounted and struck her on the head with the stick, the majority of the court held that he became thereby guilty of assault and battery.[12]

lawfully make of himself and property, see Vol. I. § 836 et seq.

[1] The State *v.* Hooker, 17 Vt. 658; Commonwealth *v.* Kirby, 2 Cush. 577; Reg. *v.* Mabel, 9 Car. & P. 474; Anonymous, 1 East P. C. 305.

[2] Commonwealth *v.* Lakeman, 4 Cush. 597. See Scribner *v.* Beach, 4 Denio, 448.

[3] The State *v.* Wood, 1 Bay, 351; Cushman *v.* Ryan, 1 Story, 91; Coleman *v.* The State, 28 Ga. 78; The State *v.* Herrington, 21 Ark. 195. See also Winfield *v.* The State, 3 Greene, Iowa, 339.

[4] People *v.* Wright, 45 Cal. 260.

[5] Ante, § 25; Crow *v.* The State, 41 Texas, 468.

[6] Riddle *v.* The State, 49 Ala. 389.

[7] McKenzie *v.* Allen, 3 Strob. 546. And see Givens *v.* Bradley, 3 Bibb, 192, 195.

[8] Scribner *v.* Beach, 4 Denio, 448; Bartlett *v.* Churchill, 24 Vt. 218; People *v.* Gulick, Hill & Denio, 229; Commonwealth *v.* Mann, 116 Mass. 58.

[9] Hazel *v.* Clark, 3 Harring. Del. 22; Gallagher *v.* State, 3 Minn. 270; Allen *v.* The State, 28 Ga. 395; Anonymous, 2 Lewin, 48.

[10] The State *v.* Quin, 3 Brev. 515; The State *v.* Wood, 1 Bay, 351; Rex *v.* Milton, Moody & M. 107; s. c. nom. Rex *v.* Mitton, 3 Car. & P. 31; Reg. *v.* Driscoll, Car. & M. 214; The State *v.* Gibson, 10 Ire. 214; Reg. *v.* Mabel, 9 Car. & P. 474; Scribner *v.* Beach, 4 Denio, 448; Bartlett *v.* Churchill, 24 Vt. 218; Commonwealth *v.* Ford, 5 Gray, 475.

[11] Reg. *v.* Driscoll, Car. & M. 214; The State *v.* Gibson, 10 Ire. 214.

[12] The State *v.* Gibson, 10 Ire. 214.

VI. *Aggravations of the Offence.*

§ 42. **In General.** — It is not strictly correct to say, that any circumstance aggravates an offence, unless the law, as distinguished from judicial discretion, visits the offence thus aggravated with an added punishment; and, when it does, the offence becomes a distinct one, usually having a separate name. Still, from early times, when misdemeanors were punished with such fine and imprisonment as the judge might see fit to inflict, it has been the habit of the courts to look upon assault as more or less aggravated by those attendant facts, which appeal to the discretion of the judge to inflict a heavy penalty. Practically, therefore, we look upon assault as aggravated both when it appeals to the judicial discretion for a heavy sentence and when it constitutes a part of a higher crime.

§ 43. **Nature of Aggravations.** — The law, therefore, may be said to deem the assault more or less enormous according to the facts of the particular transaction.[1] And the aggravating facts, even when they do not elevate the assault to a distinct crime, are usually set forth in the indictment[2] as a guide to the court in pronouncing the sentence. If they demand, in matter of law, a higher punishment, they must be so set out.[3]

§ 44. **Old English Statutes.** — There are, in considerable numbers and of various forms of provision, old English statutes which may have some force in this country, whereby assaults on particular persons and in special places are punished more heavily than common assaults. Mr. East, in his Pleas of the Crown, has a convenient collection of most of these old statutes, and the reader may consult his book with advantage.[4] Let us look at a few of the provisions here.

§ 45. **Assaults on Legislators, &c.** — Stats. 5 Hen. 4, c. 6, and 11 Hen. 6, c. 11, were directed specially against assaults upon members of parliament and their servants and attendants. From these statutes and the accompanying common law we derive the doctrine, that assaults on such persons are to be more heavily

[1] See Norton *v.* The State, 14 Texas, 387.

[2] For illustrations, see 3 Chit. Crim. Law, 821 et seq

[3] Crim. Proced. I. § 77–88.

[4] 1 East P. C. 407.

dealt with than assaults on ordinary private individuals; though, doubtless, these statutes do not bodily and in exact form constitute parts of our unwritten law.[1]

§ 46. **On Clerical Persons.** — Of a nature still more local, yet not without its effect on our unwritten law, is Stat. 9 Edw. 2, c. 3, which provides, that, "if any lay violent hands on a clerk [clergyman], the amends for the peace broken shall be before the king [in the temporal courts], and for the excommunication before a prelate [in the ecclesiastical courts] that penance corporal may be enjoined; which, if the offender will redeem of his own good will, by giving money to the prelate, or to the party grieved, it shall be required before the prelate, and the king's prohibition [that is, to prevent the spiritual court from proceeding to this extent in the case] shall not lie." Now, while no one will contend that this statute belongs bodily to our common law, which knows neither an established religion nor ecclesiastical courts, yet, as it provides for a special protection to the ministers of the form of religion which the law recognized, so, in like manner, does our unwritten law, drawing its spirit from the law of our forefathers, cast a certain degree of special protection over the ministers of all forms of the Christian religion,[2] since all are with us objects of equal regard.

§ 47. **In Churches, &c.** — Of a like spirit is 5 & 6 Edw. 6, c. 4. It provides, § 1, that, "if any person whatsoever shall, &c., by words only, quarrel, chide, or brawl in any church or churchyard, that then it shall be lawful unto the ordinary of the place where the same offence shall be done," to inflict on the offender ecclesiastical pains, in a way pointed out. § 2 provides excommunication "if any person, &c., shall smite or lay violent hands upon any other, either in any church or church-yard." § 3. "If any person, &c., shall maliciously strike any person with any weapon in any church or church-yard, or shall draw any weapon, &c., then every person so offending, and thereof being convicted, &c., before the justices, &c., shall be adjudged by the same justices, &c., to have one of his ears cut off. And if the person or persons so offending have none ears, whereby they should receive such punishment as is before declared, that then he or they to be marked and burned in the cheek with an hot iron, having the letter F. therein, whereby he or they may be known and taken

[1] And see post, § 48, note.

[2] See Vol. I. § 496, 497.

for Fray-makers and Fighters; and, besides that, every such person to be and stand *ipso facto* excommunicated, as is aforesaid." This statute shows, that, at the time when our country was settled, a special protection was cast by the law over places of public worship, and assemblies there met; and, though it cannot be deemed to be bodily a part of our common law,[1] it is still not to be entirely disregarded by us.

§ 48. **In Places occupied by Officers of State.** — Then we have Stat. 33 Hen. 8, c. 12, embodying provisions to suppress "all malicious strikings, by which blood is shed, against the king's peace, within any of the king's palaces or houses, or any other house at such time as the royal person shall happen to be there demurrant or abiding." The observations made in the last two sections apply also to this statute.[2]

[1] See post, § 48, note.

[2] **Old Statutes as Common Law — Persons attending Legislature.** — The statutes of 5 Hen. 4, c. 6; 8 Hen. 6, c. 1; and 11 Hen. 6, c. 11 (see Pulton de Pace, 9 *b*), concerning assaults upon persons going to and attending parliament and the king's council, and upon their servants, are sufficiently early in date to be common law with us; but *query*, whether they have any applicability in this country. See also 1 Deac. Crim. Law, 69; 1 East P. C. 407; 1 Hawk. P. C. Curw. ed. p. 118. Kilty deems them not to have been found applicable in Maryland. Kilty Rep. Stats. 54, 60, 61. Of the last-mentioned statute he says: "It is referred to by Blackstone, 1 vol. 165; but, although the lower house in the province frequently claimed all the privileges of the house of commons in England, I do not find that this statute was extended." Stat. 33 Hen. 8, c. 12, against striking in the king's palace, 1 East P. C. 408, is not applicable to this country; as see Kilty Rep. Stats. 75. Stat. 5 & 6 Edw. 6, c. 4, against striking, &c., in churches and church-yards, 1 East P. C. 410, 1 Russ. Crimes, 3d Eng. ed. 461, is also not applicable; as see Kilty Rep. Stats. 79. **Assaults in Gaming.** — The statute of 9 Anne, c. 14, § 8, provides, that, "In case any person or persons whatsoever shall assault and beat, or shall challenge or provoke to fight, any other person or persons whatsoever, upon account of any money won by gaming, playing, or betting at any of the games aforesaid [*i. e.* by § 1, at cards, dice, tables, tennis, bowls, or other game or games whatsoever]; such person or persons assaulting and beating or challenging, &c., upon the account aforesaid, shall, being thereof convicted upon an indictment or information, &c., forfeit all his goods, chattels, and personal estate whatsoever," and be imprisoned in the common jail of the county where the conviction is had, for two years. See 1 Hawk. P. C. Curw. ed. p. 116, and 1 East P. C. 423. In the construction of which enactment it has been held, that the assault must arise out of the play, and during the time of playing; and it is not sufficient where it arises out of a dispute concerning a game already finished. Rex *v.* Randall, 1 East P. C. 423. Kilty considers this section and part of the rest of the statute applicable to this country, and says, that in Maryland "there was an indictment in 1719 for an assault as mentioned in the 8th section, on which the party was found not guilty." Kilty Rep. Stats. 237, 248. Still its date (1710) is subsequent to the settlement of Maryland, as well as of the other older colonies; and we may doubt, therefore, whether it became the common law of all the other States. And as the forfeiture it provides would doubtless not be enforced generally here, Vol. I. § 944, 970, the importance of the statute,

§ 49. **In Courts of Justice.** — Says Lord Coke: "If any man in Westminster Hall or in any other place, sitting the courts of chancery, the exchequer, the king's bench, the common bench, or before justices of assize, or justices of oyer and terminer (which courts are mentioned in the statute of 25 Edw. 3, *De preditionibus*), shall draw a weapon upon any judge or justice, though he strike not; this is a great misprision, for the which he shall lose his right hand, and forfeit his lands and goods, and his body to perpetual imprisonment; the reason hereof is, because it tendeth *ad impedimentum legis terræ*. So it is, if, in Westminster Hall, or any other place, sitting the said courts there, or before justices of assize, or oyer and terminer, and within the view of the same, a man doth strike a juror, or any other, with weapon, hand, shoulder, elbow, or foot, he shall have the like punishment; but, in that case, if he make an assault, and strike not, the offender shall not have the like punishment." [1]

§ 50. **Summary.** — The result is, that, by the common law as it has come to us, in principles embodied partly in judicial decisions and partly in old statutes, an assault is more or less aggravated according to its circumstances. Illustrations of aggravated simple assaults are those committed in courts of justice, and upon officers of the courts,[2] and upon other official characters.[3] And

if it is common law in any locality, cannot be great; since the assault would everywhere be an indictable misdemeanor, without the statute. In England, it was repealed by Stat. 9 Geo. 4, c. 31, § 1. 1 Deac. Crim. Law, 72.

[1] 3 Inst. 140.

[2] **Further of Assaults and Affrays in Court.** — Pulton says: "The law hath specially provided, that those persons and places which be designed to the administration of justice, shall be so guarded and protected from force and violence offered unto them or in them, that she hath inflicted deeper and more grievous punishment to those who shall break or disturb the peace in the presence of those magistrates or in those places, than to them who shall break the peace in the king's own palace, where he is in person abiding, or in the parliament time ordained for the making of laws. And therefore it hath been adjudged, that, if one draw his sword to strike a justice assigned, sitting in place of judgment, and be thereof found guilty, he shall forfeit his lands and chattels, and have his right hand cut off. And likewise if one in the presence of the justices do strike a juror, he shall forfeit his lands and goods, have his right hand stricken off, and be committed to perpetual prison. And the same law is, if one of the king's justices assigned doth arrest any person which hath made a fray before him, and a stranger will rescue that prisoner, whereby he doth escape, in this case as well the prisoner as he that made the rescous shall be disherited, and be perpetually imprisoned; for that the attachment of such a justice is the king's own attachment, in the construction of the law. And if one do strike another in Westminster Hall, dur-

[3] Vol. I. § 470. And see Commonwealth *v.* Kirby, 2 Cush. 577.

such assaults, like others, may be aggravated by proceeding to a battery, or to some other higher offence.[1]

§ 51. **Assault on Embassador, &c. — On Officers of our own Government.** — An assault upon the embassador of a foreign government, committed within our territory, is a distinct offence in the law of nations, and is likewise punishable under a statute of the United States.[2] Though the assailant is ignorant of the official character of the person assaulted, it has been held that he still commits this graver offence,[3] — a doctrine not quite clear in principle, and perhaps not fully established by the authorities. If sound, it proceeds on the fact that the defendant meant to violate the law, though in a less degree. To constitute the aggravated assault upon one of the officers of our own government, the transgressor, it seems, must know of the official character.[4] And in this the Scotch law appears to be in harmony with our own.[5]

§ 52. **An Element in Attempt.** — Both under the common law, and by force of numerous statutes, assault is one of various overt acts, which, blending with an intent to accomplish some ulterior unlawful purpose, constitute the indictable attempt.[6] This class of assaults is very diverse, but they are discussed in part in our first volume under the title Attempt, and in part in this volume and in the work on Statutory Crimes under the titles of the several offences, as, Homicide, Larceny, Rape, and the like.

§ 53. **Statutory Aggravations which are not Attempts.** — There

ing the time that the king's courts do sit, he shall forfeit to the king his lands and goods, have his right hand cut off, and be committed to perpetual prison." Pulton de Pace, ed. of 1615, 9 *b*, 10. And see 1 Deac. Crim. Law, 68; 2 Inst. 549; 3 Inst. 140; 4 Bl. Com. 125; 1 Hawk. P. C. 6th ed. c. 21; 1 East P. C. 408–410; 1 Russ. Crimes, 3d Eng. ed. 762. The reader will notice, that these punishments cannot generally be all inflicted at the present day, and in this country. See Vol. I. § 933, 940–944, 970.

[1] The stabbing of a justice of the peace used to be punishable by the cutting off of the right hand, if done after coming into Westminster Hall, but otherwise if before Oldfield's Case, 12 Co. 71.

[2] United States *v.* Hand, 2 Wash. C. C. 435; Respublica *v.* De Longchamps, 1 Dall. 111. A secretary of legation is an embassador within this rule. Respublica *v.* De Longchamps, supra. And see Vol. I. § 126–129.

[3] United States *v.* Liddle, 2 Wash. C. C. 205; United States *v.* Ortega, 4 Wash. C. C. 531; United States *v.* Benner, Bald. 234, 240. But see United States *v.* Hand, 2 Wash. C. C. 435.

[4] Commonwealth *v.* Kirby, 2 Cush. 577; Rex *v.* Gordon, 1 East P. C. 315, 352. But see Reg. *v.* Forbes, 10 Cox C. C. 362.

[5] Alexander's Case, 1 Broun, 28.

[6] Vol. I. § 553, 733, 736, 748, 751; Stat. Crimes, § 490, 502–509.

are, besides, various statutory aggravations of assault, which are not attempts, but substantive crimes. For example, —

Stabbing — Wounding — Shooting. — In England and in our States generally, there are statutes against stabbing,[1] striking, wounding,[2] shooting,[3] and the like. The meaning of the principal words in these statutes is explained in the work on Statutory Crimes.[4] Some of these assaults admit, under the statutes, of aggravation by an ulterior intent.

With Deadly Weapon. — And the same observations apply to statutes, which are not infrequent, against assaults with a deadly weapon.[5]

To extort Confession. — Where, in Alabama, it was enacted, that "all persons, to the number of two or more, who abuse, whip, or beat any person, upon any accusation, real or pretended, or to force such person to confess himself guilty of any offence," should receive a punishment mentioned in the statute, — the court held, that the accusation must be the motive for the assault; and, where its purpose was to chastise the person for having whipped a son of the assailant, the case was not within the provision.[6]

§ 54. **Punish summarily — Constitutional.** — A statute in Missouri directs, "that hereafter no assault, battery, affray, riot, rout, or unlawful assembly shall be held or considered an indictable offence, but the same shall be prosecuted and punished in a summary mode before a justice of the peace;" and this provision has been adjudged constitutional.[7]

[1] Hodges *v.* The State, 15 Ga. 117; Humphries *v.* The State, 5 Misso. 203; Rex *v.* Dyson, 1 Stark. 246; The State *v.* Brown, 21 La. An. 347; Stat. Crimes, § 315.

[2] Reg. *v.* Bowen, Car. & M. 149; Commonwealth *v.* Gallagher, 6 Met. 565; Rex *v.* Collison, 4 Car. & P. 565; Rex *v.* Griffith, 1 Car. & P. 298; Reg. *v.* Ward, Law Rep. 1 C. C. 356, 12 Cox C. C. 123; The State *v.* Ray, 37 Misso. 365; Callahan *v.* The State, 21 Ohio State, 306; Stat. Crimes, § 216, 314.

[3] Rex *v.* Voke, Russ. & Ry. 531; Robinson *v.* The State, 31 Texas, 170; Heller *v.* The State, 23 Ohio State, 582; Reg. *v.* Fretwell, Leigh & C. 443; 9 Cox C. C. 471; Reg. *v.* Lallement, 6 Cox C. C. 204.

[4] "Assault." — As to the meaning of the word assault in a statute, see Humphries *v.* The State, 5 Misso. 203; The State *v.* Freels, 3 Humph. 228; Evans *v.* The State, 1 Humph. 394; Stat. Crimes, § 216.

[5] People *v.* Congleton, 44 Cal. 92; The State *v.* Napper, 6 Nev. 113; The State *v.* Franklin, 36 Texas, 155; Prior *v.* The State, 41 Ga. 155; McKinney *v.* The State, 25 Wis. 378.

[6] Underwood *v.* The State, 25 Ala. 70.

[7] The State *v.* Ledford, 3 Misso. 102. As to a like statute in Indiana, see The State *v.* Hailstock, 2 Blackf. 257; in Arkansas, see The State *v.* Cox, 3 Eng. 436. As to a Connecticut statute concerning secret assaults, see Northrop *v.* Brush Kirby, 108.

VII. *Remaining and Connected Questions.*

§ 55. **Misdemeanor — How punished.** — Assault is misdemeanor, not felony.[1] It is therefore punishable, at the common law, by fine and imprisonment; to which may be added bonds to keep the peace.[2]

Aggravated. — Even aggravated assault is, at common law, a mere misdemeanor;[3] but, by force of statutes, some of the aggravations are, in some of our States and in England, made felonies.[4]

Instigator. — Where, therefore, this offence is misdemeanor, one who excites another to commit it will, on its commission, be a principal therein, though he was not personally present.[5]

§ 56. **Connected with other Crimes — (Battery — Rape — Homicide — False Imprisonment — Riot — Affray — Burglary).** — This offence is one which forms a part of, and is included within, several others, as explained in the preceding volume.[6] Thus, in every battery there is an assault.[7] So there is, in every rape,[8] and in most murders,[9] but perhaps not in every murder;[10] except as this consequence is, in a certain sense, and in some of the States, avoided by the rule that the same identical act cannot be both a felony and a misdemeanor at one time.[11] It appears to be the doctrine, not firmly established, that every false imprisonment includes an assault;[12] while there may be a false imprisonment which does not include a battery.[13] Probably the law admits of

[1] Commonwealth *v.* Barlow, 4 Mass. 439; Murphy *v.* Commonwealth, 23 Grat. 960.

[2] Vol. I. § 940, 945. And see Vol. I. § 933; 1 East P. C. 406, 407; 1 Russ. Crimes, 3d Eng. ed. 760; Petty *v.* San Joaquin Court, 45 Cal. 245. How, where there is also a civil suit for the same assault, see Vol. I. § 264–266; Rex *v.* Mahon, 4 A. & E. 575.

[3] People *v.* Wilson, 9 Cal. 259; The State *v.* Swann, 65 N. C. 330. See Commonwealth *v.* McLaughlin, 12 Cush. 612.

[4] Reg. *v.* Woodhall, 12 Cox C. C. 240, 4 Eng. 529; People *v.* War, 20 Cal. 117; The State *v.* Davis, 29 Misso. 391.

[5] The State *v.* Lymburn, 1 Brev. 397; Vol. I. § 685, 686.

[6] Vol. I. § 773 et seq., 791 et seq.

[7] Vol. I. § 548; ante, § 28, 33.

[8] Reg. *v.* Allen, 2 Moody, 179.

[9] Vol. I. § 781, 795; The State *v.* Nichols, 8 Conn. 496. And see Reg. *v.* Mulroy, 3 Crawf. & Dix C. C. 318.

[10] Edsall *v.* Russell, 6 Jur. 996, 999.

[11] Vol. I. § 787, 815.

[12] Ante, § 26. And see Long *v.* Rogers, 17 Ala. 540.

[13] "It has been supposed, that every imprisonment includes a battery (Bull. N. P. c. 4, p. 22; and the opinion was adopted by Lord Kenyon in Oxley *v.* Flower, and another, 2 Selw. N. P. tit. Imprisonment, I.); — but this doctrine was denied in a recent case, where it was said by the court, that it was absurd to contend that every imprisonment included a battery (Emmett *v.* Lyne, 1

riots which are not likewise assaults; but, however this may be, if there is an indictment for riot and assault, the defendant may be convicted of the assault only;[1] and, if he is acquitted of the indictment generally, he cannot afterward be proceeded against for the assault.[2] Likewise, in the language of a learned judge, the charge, in an indictment, of an affray, "necessarily includes that of an assault and battery."[3] There is no assault in the offence of burglariously breaking and entering a dwelling-house with the intent to commit therein a rape.[4]

§ 57. **Connected with Attempts.** — Where assault is the overt act in attempt, the offence is compound, and consists of two ingredients; namely, first, the assault; secondly, the intent to do the ulterior mischief.[5]

§ 58. **Statutory Assaults — Distinguished from Battery.** — In considering the statutes, the practitioner should remember that assault and battery are separate things. Therefore, if a statute provides a special punishment for one who shall commit an assault with intent to kill, there is no need for the assault to proceed to a battery, in order to make the offence complete.[6]

§ 59. **"Force and Violence."** — A statute provided, that, "if any person, not being armed with a dangerous weapon, shall assault another with force and violence, and with intent to rob or steal, he shall be deemed a felonious assaulter," &c.[7] And it was adjudged that merely snatching a bank-bill from the hand of a man holding it — though the hand is touched in the operation, yet not with violence, nor with the intent to injure the person — does not constitute an assault such as is a necessary ingredient in the statutory offence.[8]

§ 60. **The Intent — Civil and Criminal.** — It is not necessary, in simple assault, that there should be the specific purpose to do a particular injury, but general malevolence or recklessness is sufficient. Thus, if one snaps a pistol at another, not knowing whether it is loaded and not seeking to know, and the pistol is discharged and the ball hits the other, this is an assault.[9] The

New Rep. 255)." 1 Russ. Crimes, 3d Eng. ed. 754.

[1] Rex *v.* Hemings, 2 Show. 93; Vol. I. § 795.

[2] Rex *v.* Heaps, 2 Salk. 593.

[3] Battle, J., in The State *v.* Stanly, 4 Jones, N. C. 290, 292.

[4] Reg. *v.* Watkins, Car. & M. 264.

[5] And see Vol. I. § 729, 735, 736; ante, § 52.

[6] The State *v.* McClure, 25 Misso. 338.

[7] Mass. Rev. Stats. c. 125, § 16.

[8] Commonwealth *v.* Ordway, 12 Cush. 270.

[9] Commonwealth *v.* McLaughlin, 5 Allen, 507.

precise bounds of this doctrine are not quite clear. An assault is one of those wrongs for which a civil suit may usually be maintained without prejudice to the criminal proceeding.[1] And, in the main, the principles which determine the civil and criminal liability are the same; indeed, an eminent American judge once observed, that the party is always answerable to the public by indictment when he is to the private person by action.[2] But we may doubt whether this is quite so as respects the intent. We have seen how, in this regard, civil jurisprudence and criminal differ; the wrong intent being always a necessary element in a crime, not always in a civil liability.[3] The law indeed does not hold one liable in the civil action of trespass to the person, where the injury comes purely from an unavoidable accident, and there is no fault or carelessness whatever in him;[4] yet, without drawing a very clear or nice distinction, we may conclude, that it admits of a civil liability where a less degree of mental mischief or negligence exists than is requisite to charge one criminally.[5] If a mere accident, involving neither carelessness nor any other wrong in the intent, will not lay the foundation for a civil liability, plainly it cannot for a criminal.[6] Yet, on the other hand, it is not always necessary to the criminal offence that there should

[1] Vol. I. § 264–266.

[2] Ruffin, C. J., in The State *v.* Gibson, 10 Ire. 214, 215. See, also, Vol. I. § 1073–1076.

[3] Vol. I. § 210, 218–221, 286–288, 330, 349.

[4] Wakeman *v.* Robinson, 1 Bing. 213; Brown *v.* Kendall, 6 Cush. 292; Dickenson *v.* Watson, T. Jones, 205; Underwood *v.* Hewson, 1 Stra. 596.

[5] Weaver *v.* Ward, Hob. 134; Rex *v.* Gill, 1 Stra. 190; Bullock *v.* Babcock, 3 Wend. 391. In such a case as James *v.* Campbell, 5 Car. & P. 372, where it was held, that, if one of two persons fighting, unintentionally strikes a third, he is answerable in an action for damages, there would perhaps be also a criminal liability, as see Vol. I. § 327–335, 375, and note; 1 Russ. Crimes, 3d Eng. ed. 755, note. In Weaver *v.* Ward, above cited, it was held, that, if one trained soldier wounds another in skirmishing for exercise, an action of trespass will lie, unless it also appears that he was guilty of no negligence, and the injury was inevitable. "For though," says the report, "it were agreed, that, if men tilt or tourney in the presence of the king, or if two masters of defence playing their prizes kill one another, that this shall not be felony; or if a lunatic kill a man, or the like; because felony must be done *animo felonico*: yet, in trespass which tends only to give damages according to hurt or loss, it is not so. And, therefore, if a lunatic hurt a man, he shall be answerable in trespass; and therefore no man shall be excused of a trespass (for this is the nature of an excuse, and not of a justification, *prout ei bene licuit*), except it may be judged utterly without his fault: as, if a man by force take my hand and strike you; or, if here the defendant had said that the plaintiff ran across his piece while it was discharging; or had set forth the case with the circumstances so as it had appeared to the court that it had been inevitable, and that the defendant had committed no negligence to give occasion to the hurt." p. 134 *a*.

[6] 1 Russ. Crimes, 3d Eng. ed. 754, 755.

be a specific determination to commit an assault, or a battery, or any other crime which in law includes an assault.[1]

§ 61. **Civil and Criminal further distinguished.** — There are cases in which an indictment will lie, where the civil injury cannot be practically redressed; as, for instance, if a wife is assaulted and dies, the husband cannot pursue his civil remedy, which ceased with her life;[2] yet a criminal responsibility rests still on the offender.

§ 62. **Attempts to commit Assault.** — The reader has not failed to apprehend, that an assault is in itself a particular kind of attempt.[3] It would seem, therefore, not possible there should be an indictable attempt to commit a simple assault.[4] Yet there may, perhaps, be to commit an aggravated or compound assault; a matter, however, which requires no elucidation here, being referable to the general principles discussed under the title Attempt[5] in the preceding volume.[6] And the court of the District of Columbia has held, that an indictment at common law lies for a solicitation — which is one form of attempt[7] — to inflict a battery.[8]

[1] In Keay's Case, 1 Swinton, 543, Scotch, Lord Cockburn said: "It may appear on proof, that the panel had no actual intention of injuring the boy. But there may be a constructive intention." **School-master.** — In a criminal case for assault and battery, against a school-master, on the ground of an alleged excessive punishment of a scholar, the court was requested by the defendant's counsel to instruct the jury, "that a school-teacher is amenable to the laws in a criminal prosecution, for punishing a scholar, only when he acts *malo animo*, from vindictive feelings, or under the violent impulse of passion or malevolence." This instruction the court refused to give; and, instead of it, said, "that in inflicting corporal punishment a teacher must exercise reasonable judgment and discretion," &c. The revising tribunal sanctioned the course of the court below; and Bigelow, J., observed: "It is undoubtedly true, that, in order to support an indictment for an assault and battery, it is necessary to show that it was committed *ex intentione*, and that, if the criminal intent is wanting, the offence is not made out. But this intent is always inferred from the unlawful act. The unreasonable and excessive use of force on the person of another being proved, the wrongful intent is a necessary and legitimate conclusion in all cases where the act was designedly committed. It then becomes an assault and battery, because purposely inflicted without justification or excuse." Commonwealth *v.* Randall, 4 Gray, 36, 38.

[2] Higgins *v.* Butcher, Yelv. 89.

[3] See ante, § 23, note.

[4] See Rex *v.* Butler, 6 Car & P. 368.

[5] Vol. I. § 723 et seq.

[6] And see Rex *v.* Philipps, 6 East, 464; Rex *v.* Williams, 2 Camp. 506.

[7] Vol. I. § 768, 769.

[8] United States *v.* Lyles, 4 Cranch C. C. 469, "Morsell, J., not very clear, and Thruston, J., doubting, Cranch, C. J., not doubting." **Conspiracy.** — So there may be an indictable conspiracy, another form of attempt, to commit the offence of assault and battery.

For ATTEMPT, see Vol. I. § 723 et seq.

CHAPTER IV.

BARRATRY.[1]

§ 63. **General View.** — This offence, termed also common barratry, fell under the frequent animadversion of the law in ancient times. But we have few modern adjudications relating to it, therefore little can be said of it, further than to repeat what is found in the old books. No doubt exists, however, that in its leading features, it remains, at the present day, a common-law offence with us.[2]

§ 64. **How defined.** — In the preceding volume[3] was repeated the definition of Blackstone; namely, "common barratry is the offence of frequently exciting and stirring up suits and quarrels between his majesty's subjects, either at law or otherwise."[4]

The Doctrine in Brief. — Lord Coke has reported a case in which the court said: "A common barrator is a common mover or stirrer up or maintainer of suits, quarrels, or parties, either in courts or in the country, — in courts of record, and in the county, hundred, and other inferior courts. In the country, in three manners: in disturbance of the peace; in taking or detaining of the possession of houses, lands, or goods, &c., which are in question or controversy, not only by force, but also by subtlety and deceit, and for the most part in suppression of truth and right; by false invention, and sowing of calumny, rumors, and reports, whereby discord and disquiet arise between neighbors."[5]

§ 65. **Analogous to what Offences.** — The reader will see, that common barratry is analogous to several other offences; as main-

[1] For matter relating to this title, see Vol. I. § 541, 974, 975. And see this volume, CHAMPERTY AND MAINTENANCE, and Vol. I. NUISANCE, § 1071 et seq. For the pleading, practice, and evidence, see Crim. Proced. II. § 98 et seq. See, also, Stat. Crimes, § 560, 568.

[2] And see Commonwealth *v.* Davis, 11 Pick. 432.

[3] Vol. I. § 541.

[4] 4 Bl. Com. 134.

[5] Case of Barretry, 8 Co. 36 *b*. And see 1 Gab. Crim. Law, 137; 1 Hawk. P. C. Curw. ed. p. 474, 475; Co. Lit. 368; The State *v.* Chitty, 1 Bailey, 379, 397.

tenance and champerty,[1] libel,[2] spreading false news,[3] forcible entry and detainer,[4] and some others. But it also differs from all these; and prominent among the points of difference is this, that, while they may severally be committed by a single act, or by a series of acts constituting one transaction, common barratry is a quarrel, as Lord Coke says, "not in one or two, but in many," cases.[5]

"Common" — How many Instances. — The indictment, therefore, must charge the offender with being a "common barrator;"[6] and the proof must show at least three instances of offending. Three instances seem to be ordinarily sufficient, probably not always, — a point, however, not clearly settled by the authorities.[7]

§ 66. **Whether by Suits in One's own Right.** — "It hath been holden," says Hawkins, "that a man shall not be adjudged a barrator in respect of any number of false actions brought by him in his own right. However, if such actions be merely groundless and vexatious, without any manner of color, and brought only with a design to oppress the defendants, I do not see why a man may not as properly be called a barrator for bringing such actions himself, as for stirring up others to bring them."[8] This view is evidently correct in principle,[9] and is not without foundation in authority.[10]

§ 67. **Justice of Peace — Suits before Himself.** — Likewise a majority of the South Carolina court held, that a justice of the peace commits this offence by exciting criminal prosecutions to be brought before himself as magistrate; neither, in defence, is it sufficient for him that they were not groundless, if he stirred them up to exact fees for afterward having them discontinued.[11]

§ 68. **Attorney.** — "But it seems," adds Hawkins, "that an attorney is in no danger of being judged guilty of barratry, in

[1] Vol. I. § 541; post, CHAMPERTY AND MAINTENANCE.

[2] Vol. I. § 540, 591, 734; post, LIBEL AND SLANDER.

[3] Vol. I. § 472–478.

[4] Vol. I. § 536–538, post, FORCIBLE ENTRY AND DETAINER.

[5] Case of Barretry, 8 Co. 36 *b*, 37 *b*; Rex *v.* Roberts, 1 Camp. 399, 400.

[6] Case of Barretry, supra; Train & Heard Prec. 55; Rex *v.* Hardwicke, 1 Sid. 282; 1 Hawk. P. C. Curw. ed. p. 475, § 9; Crim. Proced. II. § 99.

[7] Commonwealth *v.* McCulloch, 15 Mass. 227; Commonwealth *v.* Davis, 11 Pick. 432, 435; Commonwealth *v.* Tubbs, 1 Cush. 2, 3; The State *v.* Chitty, 1 Bailey, 379.

[8] 1 Hawk. P. C. Curw. ed. p. 475, § 3.

[9] See Vol. I. § 588; Commonwealth *v.* McCulloch, 15 Mass. 227; 1 Gab. Crim Law, 137; 3 Greenl. Ev. § 67.

[10] Anonymous, 3 Mod. 97.

[11] The State *v.* Chitty, 1 Bailey, 379

respect of his maintaining another in a groundless action, to the commencing whereof he was no way privy."[1]

§ 69. **Misdemeanor — How punished — Lawyers.** — Barratry is a common-law misdemeanor, punishable by fine and imprisonment;[2] to which, of course, may be added bonds to keep the peace and be of good behavior.[3] And if the offenders "be of any profession relating to the law, they ought also to be further punished by being disabled to practise for the future."[4]

[1] 1 Hawk. P. C. Curw. ed. p. 475, § 4.

[2] Case of Barretry, 8 Co. Fras. ed. 36 *b*, note; The State *v.* Chitty, 1 Bailey, 379; 1 Gab Crim. Law, 138; Vol. I. § 940–947.

[3] Vol. I. § 945; ante, § 55.

[4] 1 Hawk. P. C. Curw. ed. p. 476, § 14; The State *v.* Chitty, supra. And see post, CONTEMPT OF COURT.

CHAPTER V.

BATTERY.[1]

§ 69 *a*. Introduction.
70–72 *d*. Common-law Battery.
72 *e*. Statutory Batteries.

§ 69 *a*. **How Chapter divided.** — We shall consider, I. Common-law Battery; II. Something of Statutory Batteries.

I. *Common-law Battery.*

§ 70. **Defined.** — A battery was in the first volume defined to be any unlawful beating, or other wrongful physical violence or constraint, inflicted on a human being without his consent.[2] Hence, —

§ 71. **How related to Assault.** — In most instances, a battery is an assault which has travelled to the accomplishment of its purpose; being the substantive offence, to commit which the assault is the attempt.[3] The distinction appears to be, that in every battery there is an assault,[4] but there may be an indictable attempt to commit a battery which does not amount to assault.[5] Hence also —

[1] See ASSAULT, under which title the doctrine of Battery is also considered. For the pleading, practice, and evidence, see Crim. Proced. II. § 54 et seq. And see, for various forms of the statutory offence, Stat. Crimes, § 463–514, 1116.

[2] Vol. I. § 548. And see Johnson *v.* Tompkins, Bald. 571, 600. Hawkins says: "It seems that any injury whatsoever, be it never so small, being actually done to the person of a man in an angry, revengeful, rude, or insolent manner, as by spitting in his face, or any way touching him in anger, or violently jostling him out of the way, are batteries in the eye of the law." 1 Hawk. P. C. Curw. ed. p. 110, § 2. Russell, following this exposition, defines: "A battery is more than an attempt to do a corporal hurt to another; but any injury whatsoever, be it ever so small, being actually done to the person of a man, in an angry or revengeful, or rude or insolent manner, such as spitting in his face, or in any way touching him in anger, or violently jostling him out of the way, is a battery in the eye of the law." 1 Russ. Crimes, 5th Eng. ed. 957, 958. And compare with definitions of assault, ante, § 23 and note.

[3] Ante, § 57, 62.

[4] Ante, § 33, 56; Johnson *v.* The State, 17 Texas, 515.

[5] Ante, § 23, note.

Elsewhere — Here. — The doctrine of battery was necessarily in the main treated of under the title Assault. But there remain for this place a few explanations; in connection with which, to render the whole subject more clear, will be given some condensed repetitions, in altered forms of words, of what is laid down in the previous chapter.

§ 72. **Physical Touch — (Combined with what).** — A battery requires some sort of physical touch, not necessarily with the hand, or with any thing held in it, nor need it be upon the nude flesh. But the slightest touching of another,[1] or of his clothes or cane or any thing else attached to his person, if unlawful[2] or with intent to injure[3] and against his will,[4] — especially (elements not in strict law essential[5]) when angry, rude, insolent, or lustful,[6] — will suffice.[7] For example, —

Spitting — Throwing Water — Setting Dog on. — A common illustration of a battery is where one spits in another's face,[8] or on his body,[9] or throws water on him,[10] or by encouraging a dog causes him to be bitten.[11] So —

§ 72 *a*. **Unlawful Act resulting in Injury.** — On principle, and in some degree on the authorities, which are not quite distinct as to the limits of the doctrine, any unlawful act of a sort immediately dangerous to another or others physically, is, if physical injury ensues to any one, a battery of him. A common illustration is

[1] 1 Russ. Crimes, 5th Eng. ed. 957, 958. "For the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it; every man's person being sacred, and no other having a right to meddle with it in any the slightest manner." Ib.

[2] Ante, § 37; The State *v.* Shelton, 79 N. C. 605; Agnew *v.* Jobson, 13 Cox C. C. 625, 19 Eng. Rep. 612. And see Commonwealth *v.* Adams, 114 Mass. 323.

[3] Richels *v.* The State, 1 Sneed, 606. Compare with Commonwealth *v.* McLaughlin, 5 Allen, 507.

[4] Ante, § 35; The State *v.* Pickett, 11 Nev. 255; Duncan *v.* Commonwealth, 6 Dana, 295; Smith *v.* The State, 12 Ohio State, 466.

[5] See, among other authorities, The State *v.* Shelton, supra. Agnew *v.* Jobson, supra; Forde *v.* Skinner, 4 Car. & P. 239, Gray *v.* Ayres, 7 Dana, 375; Hill *v.* The State, 63 Ga. 578. And see The State *v.* Neff, 58 Ind. 516; Coward *v.* Baddeley, 4 H. & N. 478.

[6] Ante, § 36; Goodrum *v.* The State, 60 Ga. 509; Ridout *v.* The State, 6 Texas Ap. 249; Schuck *v.* Hagar, 24 Minn. 339.

[7] Johnson *v.* The State, 17 Texas, 515; Respublica *v.* De Longchamps, 1 Dall. 111, 114; The State *v.* Davis, 1 Hill, S. C. 46; United States *v.* Ortega, 4 Wash. C. C. 531, 534; McCulley *v.* The State, 62 Ind. 428; The State *v.* Philley, 67 Ind. 304; Howard *v.* The State, 67 Ind. 401; Reg. *v.* Day, 1 Cox C. C. 207, 208. And see Rich *v.* Hogeboom, 4 Denio, 453; Marentille *v.* Oliver, 1 Penning. 379.

[8] 1 Hawk. P. C. Curw. ed. p. 110, § 2; Reg. *v.* Cotesworth, 6 Mod. 172.

[9] Cairns's Case, 1 Swinton, 597, 610.

[10] Pursell *v.* Horne, 3 Nev. & P. 564.

[11] 1 Russ. Crimes, 5th Eng. ed. by Prentice, 958.

where a blow aimed at one takes effect on another: it is a battery of the latter.[1] And it is the same where an indiscriminate, dangerous act injures a particular person, — as where a man discharges a gun[2] or throws a lighted squib[3] into a crowd, — it is a battery of the one hit. In like manner, the wilful exposure of a helpless and dependent human being to the elements, whereby physical harm ensues, is a battery of him.[4] So also it is a battery to leave a deleterious substance for an individual to find and take, if he takes it and is injured thereby.[5] The inanimate thing which inflicts the injury is the innocent agent[6] of him who, with criminal intent, causes it to act in the particular instance. Such is the plain doctrine of principle, but it seems to have been overlooked in some of the English cases cited.

§ 72 *b*. **Undue Force after Consent or other Justification.** — While, in the absence of fraud or other special facts, consent will prevent that from being a battery which otherwise would be such,[7] force in malicious excess of the consent will take away its justifying effect. To put a palpable case, one permitting another to bleed him to a harmless extent does not thereby authorize the cutting of an artery from which the life itself may flow away. Or, to draw illustrations from the books, though a woman consents to an act of sexual intercourse, it will be a battery if performed in a brutal manner.[8] Or if, not suspecting venereal disease, she consents to intercourse with an infected man who knows the fact and conceals it from her, he, by accepting her consent and communicating the infection, becomes guilty of a criminal battery.[9] But, in a civil suit by the woman, she will be shut off from her remedy by reason of her voluntary participation[10] in the immoral act the consequence whereof constitutes the ground of her com-

[1] James *v.* Campbell, 5 Car. & P. 372. See Commonwealth *v.* Morgan, 11 Bush, 601.

[2] The State *v.* Myers, 19 Iowa, 517.

[3] And this equally as to the last person, when it is tossed from hand to hand by those whom it strikes. Scott *v.* Shepherd, 2 W. Bl. 892.

[4] This sort of offence is so covered by statutes — as, for example, see 1 Russ. Crimes, 5th Eng. ed. 947 et seq. — that we have not so much direct authority to the point as one would otherwise expect. But there can be no doubt of the correctness of the doctrine of the text. Consult Reg. *v.* Hogan, 2 Den. C. C. 277, 5 Cox C. C. 255; Rex *v.* Ridley, 2 Camp. 650, 653.

[5] Reg. *v.* Button, 8 Car. & P. 660. But see Reg. *v.* Walden, 1 Cox C. C. 282; Reg. *v.* Hanson, 2 Car. & K. 912. See Reg. *v.* March, 1 Car. & K. 496; Commonwealth *v.* Adams, 114 Mass. 323.

[6] Vol. I. § 310, 651.

[7] Ante, § 35, 36; post, § 94.

[8] Richie *v.* The State, 58 Ind. 355, 359.

[9] Reg. *v.* Sinclair, 13 Cox C. C. 28 Reg. *v.* Bennett, 4 Fost. & F. 1105.

[10] 2 Bishop Mar. & Div. § 75.

plaint.[1] So also it is a battery to repel a trespasser on property or the person by unreasonable and needless force and injury;[2] or to inflict lawful chastisement with an unlawful weapon or in excess;[3] or to do any other rightful act in a wrongful or injurious manner.[4]

§ 72 *c*. **Intent — (Drunkenness — Instances of Intent insufficient).** — At common law, and under a part of the statutes, battery is not among the crimes requiring a specific intent,[5] but the general malevolence of the criminal law will suffice.[6] Consequently the fact of the defendant being drunk will not justify or excuse him.[7] But there must be some sort of evil in the intent. Therefore it is not a battery to lay the hand gently on one to attract his attention[8] or to point him out to an officer who has a warrant of arrest against him,[9] or unavoidably to ride upon a person with a horse which has suddenly taken fright,[10] or for one soldier to hurt another accidentally by discharging his gun in exercise[11] wherein he is duly cautious,[12] or for a skin which one is with due care throwing down to hit another by being taken from its proper course by the wind.[13]

§ 72 *d*. **Rightful Force.** — The employment, by one upon another, of any force which under the circumstances is rightful, is not a battery,[14] — a doctrine explained under the title Assault.[15]

[1] Hegarty *v.* Shine, 14 Cox C. C. 124; Ib. 145.

[2] Hairston *v.* The State, 54 Missis. 689; The State *v.* Taylor, 20 Kan. 643; Skidmore *v.* The State, 2 Texas Ap. 20; King *v.* The State, 4 Texas Ap. 54; Cotton *v.* The State, 4 Texas, 260; The State *v.* Lawry, 4 Nev. 161; Hendrix *v.* The State, 50 Ala. 148; Trogden *v.* Henn, 85 Ill. 237; Agee *v.* The State, 64 Ind. 340. See Filkins *v.* People, 69 N. Y. 101.

[3] Neal *v.* The State, 54 Ga. 281; The State *v.* Hull, 34 Conn. 132; Commonwealth *v.* Seed, 5 Pa. Law Jour. Rep. 78; Stanfield *v.* The State, 43 Texas, 167. See Prewitt *v.* The State, 51 Ala. 33; Reg. *v.* Miles, 6 Jur. 243.

[4] Commonwealth *v.* Coffey, 121 Mass. 66; Tarpley *v.* People, 42 Ill. 340; Rasberry *v.* The State, 1 Texas Ap. 664; The State *v.* Williams, 75 N. C. 134; The State *v.* Ross, 2 Dutcher, 224; Robinson *v.* The State, 54 Ala. 86.

[5] Vol. I. § 320, 335, 408.

[6] Crim. Proced. II. § 55, ante, § 60, The State *v.* Sloanaker, 1 Houst. Crim. 62.

[7] Vol. I. § 399 et seq.; Commonwealth *v.* Malone, 114 Mass. 295.

[8] Coward *v.* Baddeley, 4 H. & N. 478.

[9] 1 Hawk. P. C. Curw. ed. p. 110, § 2; 1 Russ. Crimes, 5th Eng. ed. 962, from which place I have extracted some of the other illustrations and authorities in this connection.

[10] Gibbons *v.* Pepper, 4 Mod. 405; Holmes *v.* Mather, Law Rep. 10 Ex. 261.

[11] Weaver *v.* Ward, Hob. 134.

[12] Dickenson *v.* Watson, T. Jones, 205; Underwood *v.* Hewson, 1 Stra. 596; Scott *v.* Shepherd, 2 W. Bl. 892, 896.

[13] Rex *v.* Gill, 1 Stra 190.

[14] Codd *v.* Cabe, 1 Ex. D. 352, 13 Cox C. C. 202; The State *v.* Stephenson, 20 Texas, 151; Townsend *v.* Jeffries, 24 Ala. 329; The State *v.* Neff, 58 Ind. 516.

[15] Ante, § 37.

II. *Something of Statutory Batteries.*

§ 72 *e*. **Many Statutes.** — Battery, like assault, has been greatly legislated upon from early times both in England and this country. A very grave form of the offence, recognized at the common law and made heavily punishable by statutes, is mayhem.[1] And statutes almost numberless have created still other forms less than this in atrocity.[2] So, in some of the States, there are statutes more or less modifying the common-law offence itself.[3] As far as deemed necessary, these statutes are explained in "Statutory Crimes."

[1] Post, § 1001 et seq.; Godfrey *v.* People, 63 N. Y. 207; The State *v.* Bloedow, 45 Wis. 279.

[2] As, for example, see Rex *v.* Davis, 1 Leach, 4th ed. 493; Reg. *v.* Miller, 14 Cox C. C. 356; The State *v.* Jessie, 30 La. An. 1170; Starks *v.* The State, 7 Baxter, 64.

[3] The State *v.* Wright, 52 Ind. 307; Buntin *v.* The State, 68 Ind. 38; Howard *v.* The State, 67 Ind. 401; Guy *v.* The State, 1 Kan. 448; The State *v.* Goddard, 69 Maine, 181. See Warrock *v.* The State, 9 Fla. 404.

For BAWDY-HOUSE, see Vol. I. § 1083 et seq.
BESTIALITY, see SODOMY.
BETTING, see Stat. Crimes, and Vol. I. § 686, 821.
BIGAMY, see Stat. Crimes.

CHAPTER VI.

BLASPHEMY AND PROFANENESS.[1]

§ 73–75. Introduction.
76–78. Blasphemy.
79. Profaneness.
80–84. Doctrines common to both.

§ 73. **Scope of this Chapter.** — The two common-law offences of blasphemy and profaneness differ only in this, that blasphemy is the word of larger meaning embracing more than the other. And our statutes do not much distinguish between them. Therefore it is deemed best to treat of the two together, in one chapter.

§ 74. **Indictable — Why.** — We have seen,[2] that these offences are indictable at the common law. Whether the principle which makes them so is, that they tend to undermine Christianity, which in a certain sense is a part of our common law,[3] or that they disturb the peace and corrupt the morals of the community,[4] or whether these two principles combine to impart the indictable quality, is a question on which opinions appear not to be quite in harmony. The true view probably is, that, in this instance as in many others, the legal doctrine may be deemed equally to result from any one of several causes; as, from either of the two above mentioned, or from the consideration that reverence toward God and religion — Christianity being our form of religion — is essential to man, who is injured in his nature and being when it is impaired; or, still another, that these offences so shock his purer and higher sensibilities as to create an injury to him against which he needs protection, precisely as against an assault.[5]

[1] For matter relating to this title, see Vol. I. § 498. For the pleading, practice, and evidence, see Crim. Proced. II. § 123 et seq. And see Stat. Crimes, § 560.

[2] Vol. I. § 498.

[3] Vol. I. § 497; Rex *v.* Woolston, 2 Stra. 834.

[4] Vol. I. § 498.

[5] See Vol. I. § 250–252, 548. In People *v.* Ruggles, 8 Johns. 290, Kent, C. J., observed: "The people of this State, in common with the people of this country, profess the general doctrines of Christianity, as the rule of their faith and practice; and to scandalize the author of these doctrines is not only, in a religious point of view, extremely impious, but even, in respect to the obligations due to

In any view, these offences belong to the general family of public nuisance.[1]

§ 75. **Order of the Chapter.** — We shall further consider this subject as respects, I. Blasphemy; II. Profaneness; III. Doctrines common to both.

I. *Blasphemy.*

§ 76. **Definition.** — Blasphemy is any oral or written[2] reproach maliciously cast upon God, his name, attributes, or religion.[3]

society, is a gross violation of decency and good order. Nothing could be more offensive to the virtuous part of the community, or more injurious to the tender morals of the young, than to declare such profanity lawful. . . . . Things which corrupt moral sentiment, — as obscene actions, prints, and writings, and even gross instances of seduction, — have, upon the same principle, been held indictable. . . . . No government among any of the polished nations of antiquity, and none of the institutions of modern Europe (a single and monitory case excepted), ever hazarded such a bold experiment upon the solidity of the public morals, as to permit with impunity, and under the sanction of their tribunals, the general religion of the community to be openly insulted and defamed. The very idea of jurisprudence, with the ancient lawgivers and philosophers, embraced the religion of the country." See also the observations of Clayton, C. J., in The State *v.* Chandler, 2 Harring. Del. 553, 569. And see Andrew *v.* New York Bible and Common Prayer Book Society, 4 Sandf. 156; Vidal *v.* Girard's Executors, 2 How. U. S. 127, 198; Ex parte Delaney, 43 Cal. 478.

[1] The State *v.* Graham, 3 Sneed, Tenn. 134; The State *v.* Powell, 70 N. C. 67; The State *v.* Pepper, 68 N. C. 259.

[2] The State *v.* Chandler, 2 Harring. Del. 553.

[3] 1. While it is plain, that, at common law, blasphemy is indictable, the books do not give us any very exact and neat definitions of it. Indeed, this and kindred offences are, in the books, more or less blended; rendering it not clear where the lines separating them into their several classes should be drawn. Nor is it practically important to make the separation. The general doctrine seems to be, that, under one name or another, every oral or written representation whereby men's reverence for the Power which controls them and the world is ruthlessly shocked or impaired, is indictable at the common law. And within this general doctrine, it is indictable to revile the name of Jesus Christ, or to revile the Holy Scriptures, or the sacraments; because, though these may not, by all men among us, be deemed to pertain to natural religion, or be in any way accepted as a part of their faith, yet they pertain to Christianity, of which indeed they constitute the outward substance, and Christianity is the religion alike of our forefathers, and of the mass of the people among us, and consequently it constitutes in some sense a part of our common law. Vol. I. § 497.

2. Hawkins mentions, among the common-law offences against religion: "First, all blasphemies against God; as, denying his being or providence, and all contumelious reproaches of Jesus Christ. Secondly, all profane scoffing at the Holy Scripture, or exposing any part thereof to contempt or ridicule. Thirdly, impostures in religion; as falsely pretending to extraordinary commissions from God, and terrifying and abusing the people with false denunciations of judgment, &c." 1 Hawk. P. C. Curw. ed. p. 358, § 1–3.

3. There are some English statutes, early enough in date to be common law with us, pertaining to this matter I

General Description. — "In general," said a learned judge, "blasphemy may be described as consisting in speaking evil of the Deity, with an impious purpose to derogate from the divine majesty, and to alienate the minds of others from the love and reverence of God. It is purposely using words, concerning God, calculated and designed to impair and destroy the reverence, respect, and confidence due to him, as the intelligent creator, governor, and judge of the world. It embraces the idea of detraction, when used towards the Supreme Being; as, 'calumny' usually carries the same idea, when applied to an individual. It is a wilful and malicious attempt to lessen men's reverence of

quote from Hawkins: "By the Statute 1 Edw. 6, c. 1, repealed by 1 Mary, c. 2, and revived by 1 Eliz. c. 1, it is enacted, 'that whoever shall deprave, despise, or contemn the blessed sacrament of the Lord's supper, in contempt thereof, by contemptuous words, or by any words of depraving, despising, or reviling; or shall advisedly in any otherwise contemn, despise, or revile the said most blessed sacrament, shall suffer imprisonment, and make fine and ransom at the king's will and pleasure.' By 3 Jac. 1, c. 21: 'Whoever shall use the name of the Holy Trinity profanely or jestingly, in any stage play, interlude, or show, shall be liable to a *qui tam* penalty of ten pounds.' By 1 Will. 3, c. 18, § 17 [subsequent to the settlement of the older colonies]: 'Whoever shall deny in his preaching or writing, the doctrine of the blessed Trinity, shall lose all benefit of the act for granting toleration, &c.'" And Hawkins proceeds: "I shall not mention the offences against 2 & 3 Edw. 6, c. 19, and 5 Eliz. c. 5, relating to fasts and fish-days, because it is expressly declared that those statutes are enacted merely on a political account; and it is made penal to affirm that any eating of fish, or forbearing of fish, mentioned therein, is necessary to salvation, or that it is the service of God." 1 Hawk. P. C. Curw. ed. p. 365, § 31–34. As to how statutes like these are to be regarded, see ante, § 44–48 and note.

4. Gentlemen who are searching through the English law on this subject, will not fail to look into the State Trials. See Williams's Case, for Blasphemy in publishing Paine's Age of Reason, 26 Howell St. Tr. 653, embracing an able argument by Mr. Erskine, who appeared for the prosecution. Mr. Justice Ashhurst, in pronouncing sentence against the prisoner, who had been convicted, said: "All offences of this kind are not only offences to God, but crimes against the law of the land; inasmuch as they tend to destroy those obligations whereby civil society is bound together; and it is upon this ground that the Christian religion constitutes part of the law of England." And he added: "If the name of our Redeemer were suffered to be traduced, and his holy religion treated with contempt, the solemnity of an oath, on which the due administration of justice depends, would be destroyed, and the law be stripped of one of its principal sanctions, the dread of future punishments." p. 715–719. See also Eaton's Case, 31 Howell St. Tr. 927; Aikenhead's Case (Scotch), 13 Howell St. Tr. 918; Nayler's Case, 5 Howell St. Tr. 802.

5. It must be obvious, that the English cases on this subject, especially the older ones, can be received in this country only in a sort of general way, not as being in all particulars applicable here. For example, it is not probable that generally in our courts a conviction could be obtained against a publisher of Paine's Age of Reason. And, as we have no established form of religion, libels on particular formalities of worship might not be indictable here to the extent to which they would be in England, if directed against the formalities of the English Church.

God, by denying his existence, or his attributes as an intelligent creator, governor, and judge of men, and to prevent their having confidence in him as such."[1]

§ 77. **Reviling Scriptures.** — And so a malicious reviling of the Sacred Scriptures, whether of the Old or New Testament, is blasphemy.[2] When, therefore, one with the evil intent necessary as the foundation of this offence, said, "that the Holy Scriptures were a fable; that they were a contradiction; and that, although they contained a number of good things, yet they contained a great many lies," — he was held, in Pennsylvania, to be indictable both at the common law and under the statute of that State.[3]

§ 78. **Jesus Christ.** — In like manner, words spoken against the author of Christianity come within the same condemnation. When, therefore, with intent to vilify the Christian religion, the defendant had said, "The Virgin Mary was a whore, and Jesus Christ a bastard," he was held to have been rightly convicted of blasphemy.[4] And a malicious publication, in substance, that Jesus Christ was an impostor and a murderer in principle, was held to be blasphemous.[5]

II. *Profaneness.*

§ 79. **General Doctrine.** — We have seen,[6] that profane swearing is an indictable nuisance at the common law. It is a species of blasphemy. There is little need to define it. Under the statute of Connecticut, "profane swearing" was said to be con-

[1] Shaw, C. J., in Commonwealth *v.* Kneeland, 20 Pick. 206, 213. "This species of offence," said Duncan, J., in Updegraph *v.* Commonwealth, 11 S. & R. 394, 406, "may be classed under the following heads: first, denying the being and providence of God; second, contumelious reproaches of Jesus Christ, profane and malevolent scoffing at the Scriptures, and exposing any part of them to contempt and ridicule; third, certain immoralities tending to subvert all religion and morality, which are the foundation of all governments."

[2] Reg. *v.* Hetherington, 5 Jur. 529; People *v.* Ruggles, 8 Johns. 299; 1 Hawk. P. C. Curw. ed. p. 358, § 2.

[3] Updegraph *v.* Commonwealth, 11 S. & R. 394.

[4] The State *v.* Chandler, 2 Harring. Del. 553; People *v.* Ruggles, 8 Johns. 290; People *v.* Porter, 2 Parker, 14.

[5] Rex *v.* Waddington, 1 B. & C. 26. In this case Best, J., said: "It is not necessary for me to say, whether it be libellous to argue from the Scriptures against the divinity of Christ; that is not what the defendant professes to do. He argues against the divinity of Christ by denying the truth of the Scriptures. A work containing such arguments, published maliciously (which the jury in the case have found), is by the common law a libel." See also Reg. *v.* Gathercole, 2 Lewin, 237, 254.

[6] Ante, § 74; The State *v.* Graham, 3 Sneed, Tenn. 134.

stituted by any words importing an imprecation of future divine vengeance. Thus, — "You are a God-damned old rascal," — "You are a damned old rascal to hell," — "You are a damned old rascal," were severally held to be words of profane swearing.[1] But a single utterance of a profane word in a private place — or, it has even been held,[2] in a public street — is not *per se*, while spoken neither in a loud voice nor with repetitions, indictable; to be so, the profanity must take the form of a public nuisance.[3]

III. *Doctrines common to both.*

§ 80. **The Statutory Offence.** — In confirmation of common-law doctrine, the statutes of some of the States have special provisions making blasphemy and profaneness criminal.[4]

Illustrations — (Massachusetts — How construed). — Thus, the Massachusetts statutes provide a punishment, "if," among other things, "any person shall wilfully blaspheme the holy name of God, by denying, cursing, or contumeliously reproaching God, his creation, government, or final judging of the world." And it was held, that the wilful denial, by which is meant the denial with a bad purpose,[5] of the existence of any God except the material universe, is within the prohibition; consequently an indictment was sustained for published words, the more important of which are the following: "Universalists believe in a god, which I do not; but believe that their god, with all his moral attributes (aside from nature itself), is nothing more than a mere chimera of their own imagination."[6]

§ 81. **Constitutional.** — It has been adjudged, that neither are these statutes nor is the common-law doctrine repugnant to the constitutions of States in which the question has arisen.[7]

[1] Holcomb *v.* Cornish, 8 Conn. 375. And see Commonwealth *v.* Hardy, 1 Ashm. 410. Under the statute of Indiana, "profanely swearing three several oaths, by taking the name of God in vain," was held to be a sufficient description of the offence. Odell *v.* Garnett, 4 Blackf. 549.

[2] The State *v.* Powell, 70 N. C. 67.

[3] The State *v.* Powell, supra; The State *v.* Pepper, 68 N. C. 259; The State *v.* Jones, 9 Ire. 38.

[4] See Commonwealth *v.* Kneeland, 20 Pick. 206, Thacher Crim. Cas. 346, Commonwealth *v.* Hardy, 1 Ashm. 410; Updegraph *v.* Commonwealth, 11 S & R. 394, Odell *v.* Garnett, 4 Blackf. 549; Holcomb *v.* Cornish, 8 Conn. 375; The State *v.* Chandler, 2 Harring. Del. 553; The State *v.* Kirby, 1 Murph. 254; The State *v.* Ellar, 1 Dev. 267; The State *v.* Jones, 9 Ire. 38.

[5] And see Vol. I. § 428.

[6] Commonwealth *v.* Kneeland, 20 Pick. 206, Thacher Crim. Cas. 346.

[7] Commonwealth *v.* Kneeland, supra;

§ 82. **Liberty of the Press.** — But the law of blasphemy, statutory or common, will not be so administered as to abridge the liberty of speech and the press. For, as a learned judge once remarked, "No author or printer, who fairly and conscientiously promulgates opinions with whose truths he is impressed, for the benefit of others, is answerable as a criminal. A malicious and mischievous intention is, in such a case, the broad boundary between right and wrong; it is to be collected from the offensive levity, scurrilous and opprobrious language, and other circumstances, whether the act of the party was malicious."[1]

Conscientious Convictions. — Still, one who should utter words or sentiments calculated, according to common judgment, to corrupt the public morals, or to shock the sensibilities of mankind in a Christian community, would doubtless not be permitted to excuse himself under the plea of conscientious conviction. Men must not allow their convictions to lead them to injurious acts; or, if they do so, they must take the consequences.[2]

Publicity. — In some cases, perhaps in most,[3] it may be important to consider the degree and kind of publicity given to the matter charged as blasphemous.[4]

§ 83. **The Scotch Law.** — Blasphemy is a crime under the unwritten law in Scotland; and it has there been further provided against, to some extent, by statutes.[5] It is said by Hume to consist in the denial of the being, attributes, or nature of God; or in uttering impious and profane things against him, and against the authority of the Holy Scriptures.[6] Whether a mere candid denial of the Scriptures as a divine revelation is sufficient, is a point on which the Scotch authorities are not distinct; but it seems, that, in that country, as in this and in England, the denial, to be indictable, must go beyond fair and candid inquiry, indicating an "intention to bring them into ridicule and contempt."[7]

The State *v.* Chandler, 2 Harring. Del. 553; People *v.* Ruggles, 8 Johns. 290.

[1] Duncan, J., in Updegraph *v.* Commonwealth, 11 S. & R. 394, 405, 406; s. p. Shaw, C. J., in Commonwealth *v.* Kneeland, 20 Pick. 206, 221.

[2] And see Vol. I. § 309 and note, 344. "Every man may fearlessly advance any new doctrines, provided he does so with proper respect to the religion and government of the country." Best, J., in Rex *v.* Burdett, 4 B. & Ald. 95, 132. And see Reg. *v.* Collins, 9 Car. & P. 456; 1 Gab. Crim. Law, 73.

[3] Ante, § 79.

[4] And see The State *v.* Jones, 9 Ire. 38; The State *v.* Ellar, 1 Dev. 267.

[5] 1 Alison Crim. Law, 643; 2 Hume Crim. Law, 2d ed. 559.

[6] 1 Hume Crim. Law, 2d ed. 559.

[7] Paterson's Case, 1 Broun, 629; 2 Hume Crim. Law, 2d ed. 559.

§ 84. **Intoxication.** — In one case the Scotch court decided, that intoxication furnishes no defence for blasphemous words spoken, either as justifying them, or alleviating the crime.[1] Mr. Hume questions the correctness of this decision.[2] But the same was once ruled in New York; it "only aggravates the offence."[3] And plainly this is the true common-law doctrine,[4] whatever may be the better Scotch view.

[1] Kinninmount's Case, 1 Hume Crim. Law, 2d ed. 517.

[2] 1 Hume Crim. Law, 2d ed. 561.

[3] People *v.* Porter, 2 Parker, 14.

[4] Vol. I. § 397 et seq.

For BREACH OF THE PEACE, see Vol. I. § 533 et seq.

CHAPTER VII.

BRIBERY.[1]

§ 85. **How Defined.** — Bribery is the voluntary giving or receiving of any thing of value in corrupt payment for an official act, done or to be done.[2]

[1] For matter relating to this title see Vol. I. § 246, 468, 471, 767, 974. For the pleading, practice, and evidence, see Crim. Proced. II. § 126 et seq. And see Stat. Crimes, § 568, 573, 803.

[2] 1. And see Dishon *v.* Smith, 10 Iowa, 212. Blackstone defines: "Bribery is when a judge, or other person concerned in the administration of justice, takes any undue reward to influence his behavior in his office." 4 Bl. Com. 139. Coke: "Bribery is a great misprision, when any man in judicial place takes any fee or pension, robe or livery, gift, reward, or brocage of any person, that hath to do before him in any way, for doing his office, or by color of his office, but of the king only, unless it be meat and drink, and that of small value." 3 Inst. 145. An obvious defect in these definitions is, that the latter confines the offence to persons in "judicial place;" and the former, to persons "concerned in the administration of justice;" whereas it extends to all officers connected with the administration of the government, executive, legislative, and judicial, and, I presume, under the appropriate circumstances, military. The following is what is said in Burn's Justice upon the point: "This definition, in confining the offence to judicial officers, seems too narrow. See Rex *v.* Beale, cited 1 East, 183; Rex *v.* Vaughan, 4 Bur. 2494; Com. Dig. Officer, I. The attempt to bribe is an offence. Thus, an attempt to bribe a privy councillor to procure a reversionary patent of an office grantable by the king under the great seal was held indictable, though it did not succeed. Rex *v.* Vaughan, 4 Bur. 2494; Rex *v.* Pollman, 2 Camp. 229; Rex *v.* Plympton 2 Ld. Raym. 1377. So is an offer of a bribe to a juryman. Young's Case, cited 2 East, 14, 16. An attempt to bribe at an election for Parliament is indictable. Rex *v.* Vaughan, 4 Bur. 2494, 2500; Rex *v.* Plympton, 2 Ld. Raym. 1377; and see Henslow *v.* Fawcett, 1 Har. & W. 125. So is an attempt to bribe an officer of customs. Rex *v.* Cassano, 5 Esp. 231." Burn Just. 28th ed. by Chitty, tit. Bribery. And see The State *v.* Ellis, 4 Vroom, 102.

2. Another defect in the definitions quoted from Coke and Blackstone is, that they do not cover the case of giving a bribe; which, in truth, is just as much bribery as the receiving of one. This offence, with the reason on which it rests, may be stated as follows: Whenever the motive of lucre is placed before the mind of an official person to influence his conduct, a danger to the state is created. And though official persons are entitled to compensation for their services; and the law does not deem the compensation which itself provides to be attended with danger, since this does not bend the officer to one course rather than another; yet, whenever there is presented to the official mind the idea of money, not merited, but as a return either for a wrong act or for fresh haste in doing a right one, this constitutes an endeavor to corrupt justice at her fountains, and danger

Giving or receiving. — "As it is a crime to take a bribe, it is clearly also a crime to give one; for the offences are reciprocal." [1]

§ 86. **Gist of the offence.** — The gist of the offence seems to be the tendency of the bribe to pervert justice in any of the governmental departments, executive, legislative, or judicial. Thus, —

Voter. — If one pays money to a voter to vote at an election for a particular candidate,[2] or simply to vote,[3] or to go out of town and forbear voting,[4] the act tends to create a perturbation in the movements of the governmental machinery, and the parties are consequently indictable.

Appointment to Office. — And the Virginia court held, that a

to the entire community springs from the endeavor. If the judge spurns the bribe, he is innocent; if he accepts it, he is guilty; but, whether the bribe is taken or refused, he who offered it is equally an offender against the law.

3. Hawkins defines this offence and states the law thus: "Bribery, in a strict sense, is taken for a great misprision of one in a judicial place taking any valuable thing whatsoever, except meat and drink of small value, of any one who has to do before him any way, for doing his office, or by color of his office, but of the king only. But bribery in a large sense is sometimes taken for the receiving or offering of any undue reward, by or to any person whatsoever, whose ordinary profession or business relates to the administration of public justice, in order to incline him to do a thing against the known rules of honesty and integrity; for the law abhors any the least tendency to corruption in those who are any way concerned in its administration, and will not endure their taking a reward for the doing, which deserves the severest of punishments. Also bribery signifies the taking or giving of a reward for offices of a public nature." 1 Hawk. P. C. Curw. ed. p. 414, 415, § 1–3. See also 1 Russ. Crimes, 3d Eng. ed. 154. As to what office is meant by Stat. 49 Geo. 3, c. 126, § 3, against the corrupt sale of an office, see Reg. *v.* Charretie, 13 Jur. 450, 18 Law J. N. S. M. C. 100. As to the Virginia statute against buying and selling offices, see Commonwealth *v.* Callaghan, 2 Va. Cas. 460.

4. Growing out of the same reason, we have the condemnation in which all right-minded men hold those sinister approaches to official persons, in which people sometimes indulge; amounting to less than bribery, yet reprehensible morally if not legally. In our country especially, where the artificial dignity of office does not operate as powerfully to repel such things as in Europe, and where the desire for votes is always present with most in office, both the danger and the present evil from this source are very great. Neither public sentiment nor proper laws should be wanting with us, to restrain the wrong. In respect to the judicial office, Lord Cottenham once expressed an important truth as follows: "Every private communication to a judge, for the purpose of influencing his decision upon a matter publicly before him, always is, and ought to be, reprobated; it is a course calculated, if tolerated, to divert the course of justice, and is considered, and ought more frequently than it is to be treated, as, what it really is, a high contempt of court." Matter of Dyce Sombre, 1 Mac. & G. 116, 122.

[1] 1 Gab. Crim. Law, 163; Rex *v.* Vaughan, 4 Bur. 2494.

[2] Rex *v.* Cripland, 11 Mod. 387; Commonwealth *v.* Shaver, 3 Watts & S. 338. See Hughes *v.* Marshall, 2 Tyrw. 134, 5 Car. & P. 150.

[3] Rex *v.* Plympton, 2 Ld. Raym. 1377.

[4] Rex *v* Isherwood, 2 Keny. 202. And see Bush *v.* Ralling, Say. 289, decided on Stat. 2 Geo. 2, c. 24, § 7.

corrupt agreement between two justices of the peace, having power to appoint a commissioner and a clerk, for the one to vote for A as commissioner in consideration of the other voting for B as clerk, and *vice versa*, is, if carried into execution, an indictable misdemeanor at the common law: the decision being, however, put principally upon the ground of corruption in office.[1]

Recommendation to Office — Exchange of Prisoners. — A bribe to a privy councillor, to recommend to the king a particular person for a station within his gift;[2] or, to the agent having authority, to exchange prisoners of war out of their order;[3] is indictable within the general law of bribery.[4]

§ 87. *Degree of the Crime and its Punishment:* —

Misdemeanor. — Hawkins says: "At common law, bribery in a judge, in relation to a cause pending before him, was looked upon as an offence of so heinous a nature that it was sometimes punished as high treason before the 25 Edw. 3; and, at this day, it is certainly a very high offence, and punishable, not only with forfeiture of the offender's office of justice,[5] but also with fine and imprisonment, &c." But all other forms of bribery are misdemeanor, to be visited with imprisonment and fine.[6] As treason includes felony, and an offence which was treason becomes felony when the law ceases to hold it treason,[7] we might deem bribery in a judge, committed under the circumstances mentioned by Hawkins, to be felony, if the latter part of the quotation did not imply the contrary. But suppose it to be felony, there is, growing out of the exemption of judicial officers from the ordinary criminal process for official misconduct,[8] a practical difficulty in punishing it as such. Indeed, little doubt can be entertained, that all kinds of bribery are, in this country, under our common law, merely misdemeanor; though some kinds are misdemeanors of a very high and aggravated nature.[9]

[1] Commonwealth *v.* Callaghan, 2 Va. Cas. 460. **Conspiracy.** — Here is a conspiracy also; and, assuming the doctrine of the text to be sound, an indictment for the conspiracy might have been maintained if no appointment had actually been made.

[2] Rex *v.* Vaughan, 4 Bur. 2494.

[3] Rex *v.* Beale, cited 1 East, 183.

[4] **Approve a Claim.** — An agreement to use a supposed influence with the street commissioner to induce him to allow certain claims is illegal, and a note given in consideration of it is void. Devlin *v.* Brady, 32 Barb. 518.

[5] See also Vol. I. § 971.

[6] 1 Hawk. P. C. Curw. ed. p. 416, § 6, 7.

[7] Vol. I. § 612.

[8] See Vol. I. § 461–463.

[9] See also Commonwealth *v.* Shaver, 3 Watts & S. 338, in which it was held,

§ 88. *Attempts:*[1] —

Offering Bribe. — There are cases from which it might be inferred, that to offer a bribe is bribery, — that is, is the substantive offence, — in distinction from the indictable attempt.[2] Since bribery is a misdemeanor, it is of little or no practical consequence whether this view is correct or not. It is believed, however, that the better form of the doctrine is to consider such an offer as an attempt, not as the substantive crime.[3] And it is settled that, under the one name or the other, such offer, or the promising of a gift, is punishable the same as if it were actually accepted or delivered.[4] And if the offer is made by letter through the post-office, the writer commits a complete offence at the place where he deposits the letter,[5] as well as at the place where it is received.[6]

§ 89. **Offer in Cause not yet pending.** — The Alabama judges decided, that a tender of a bribe to a justice of the peace corruptly to decide a case not pending, but afterward to be instituted before him, — the bribe being declined, and the suit not undertaken, — is indictable at the common law. But they also held, that this transaction is not within the statute of the State against offering "any gift or gratuity whatever, with intent to influence his act, vote, opinion, decision, or judgment, on any matter, cause, or

that the bribing of a voter by a candidate for the office of sheriff is not an "infamous crime," within the meaning of art. 6, § 9, of the Constitution of Pennsylvania, a conviction of which will disqualify him from holding the office.

[1] See Vol. I. § 723 et seq.

[2] The State *v.* Ellis, 4 Vroom, 102.

[3] And see Collins *v.* The State, 25 Texas, Supp. 202; Dishon *v.* Smith, 10 Iowa, 212; Walsh *v.* People, 65 Ill. 58; Hutchinson *v.* The State, 36 Texas, 293; Commonwealth *v.* Harris, 1 Pa. Leg. Gaz. Rep. 455.

[4] Vol. I. § 767; Rex *v.* Vaughan, 4 Bur. 2494; Rex *v.* Plympton, 2 Ld. Raym. 1377; Rex *v.* Isherwood, 2 Keny. 202; Rex *v.* Cripland, 11 Mod. 387; Reg. *v.* Gurney, 10 Cox C. C. 550. And see ante, § 85, note.

[5] United States *v.* Worrall, 2 Dall. 384.

[6] In a New Jersey case, an indictment at the common law was sustained which charged, that the defendant wickedly and corruptly offered fifty dollars, to a member of the common council of Hudson City, to vote for a certain application to lay a railroad track along one of the streets of the city. Even if the common council had no jurisdiction over the application, the offer was still indictable. Said Dalrimple, J.: "The act of the defendant in endeavoring to procure the grant asked for was only the more criminal; because he sought, by the corrupt use of money, to purchase from the council an easement which they had no authority to grant He thereby endeavored to induce them to step beyond the line of their duty, and usurp authority not committed to them." The State *v.* Ellis, 4 Vroom, 102, 105.

proceeding which may be then pending, or may by law come or be brought, before him, in his official capacity."[1]

[1] Barefield *v.* The State, 14 Ala. 603. And see People ex rel. Purley, 2 Cal. 564

For BRIDGE, see WAY; also Stat. Crimes, § 301.
BUGGERY, see SODOMY.
BUILDING OF WOOD, &c., see Vol. I. § 1150, 1151

CHAPTER VIII.

BURGLARY AND OTHER BREAKINGS.[1]

§ 90. Introduction.
91–100. The Breaking and Entering.
101–103. The Time.
104–108. The Place.
109–117. The Intent.
118. Statutory Breakings.
119, 120. Remaining and Connected Questions.

§ 90. **How defined.** — Burglary is the breaking and entering, in the night, of another's dwelling-house, with intent to commit a felony therein.[2]

Order of the Discussion. — We shall consider, I. The Breaking and Entering; II. The Time; III. The Place; IV. The Intent. Then, V. Statutory Breakings; VI. Remaining and Connected Questions.

I. *The Breaking and Entering.*

§ 91. **The Breaking.** — The meaning of the verb "to break," as employed in the law of burglary, is explained in Statutory Crimes.[3] It does not require a separation of particles, as when we break a stick; but, if, for example, one lifts a latch and opens the door, or presses it open without any removing of fastenings,[4]

[1] For matter relating to this title, see Vol. I. § 262, 342, 437, 559, 577, 676, 736, 757, 1062–1064. For the pleading, practice, and evidence, see Crim. Proced. II. § 128 et seq. And see, as to both law and procedure, Stat. Crimes, § 221, 233, 234, 240, 276–278, 312, 532, 533.

[2] Vol. I. § 559. There are no wide differences as to the definition of burglary. Thus, Hawkins: "Burglary is a felony at the common law, in breaking and entering the mansion-house of another, or (as some say) the walls or gates of a walled town, in the night, to the intent to commit some felony within the same, whether the felonious intent be executed or not." 1 Hawk. P. C. Curw. ed. p. 129. Lord Coke: "A burglar (or the person that committeth burglary) is by the common law a felon, that in the night breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony, within the same, whether his felonious intent be executed or not." 3 Inst. 63. And see 4 Bl. Com. 223, 224; 2 East P. C. 484.

[3] Stat. Crimes, § 290, 312, 313.

[4] The State *v.* Reid, 20 Iowa, 413.

or with his hand raises an unfastened window,[1] or thrusts himself down the chimney,[2] or by a fraud practised on the occupant procures him to open the door,[3] he breaks the dwelling-house.[4] On the other hand, there is no breaking when one enters through an open door, window, or other aperture;[5] or pushes further open a door or window already open in part.[6]

§ 92. **The Entry.** — To constitute burglary, there must be also an entry.[7] It need not be in the same night with the breaking; though both must evidently take place in the night, and both must be with felonious intent.[8]

What is an Entry. — The entry is complete, though the whole physical frame does not pass within the dwelling-house: if a hand or any part of the body goes within, or if the instrument intended to be used in the commission of the felony does, that is sufficient.[9] Therefore a man commits this offence who cuts a hole in the shutters, thrusts in his hand, and feloniously takes away another's personal property;[10] or thrusts in his hand, with the like intention, without accomplishing the object;[11] or puts "a hook in at a window to draw out goods, or a pistol to demand one's money."[12] And if the hand is thrust within the building to finish the breaking rather than extract the goods, still it completes the entry.[13]

§ 93. **What is not an Entry.** — But if only the tool used for breaking goes in, and neither any part of the person, nor the instrument by which the ulterior felony is to be perpetrated, does, there is no burglary.[14] Thus, to raise a window by means of the

[1] Frank *v.* The State, 39 Missis. 705; Rex *v.* Hyams, 7 Car. & P. 441.

[2] Donohoo *v.* The State, 36 Ala. 281; Rex *v.* Brice, Russ. & Ry. 450.

[3] The State *v.* Johnson, Phillips, 186; The State *v.* Mordecai, 68 N. C. 207. See, as to this point, and the consent implied in a plan to entrap the burglar, Vol. I. § 261–263; Allen *v.* The State, 40 Ala. 334.

[4] Fisher *v.* The State, 43 Ala. 17; Rex *v.* Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491.

[5] Rex *v.* Lewis, 2 Car. & P. 628; Rex *v.* Johnson, 2 East P. C. 488.

[6] Stat. Crimes, § 312; Commonwealth *v.* Strupney, 105 Mass. 588.

[7] Rex *v.* Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491; Anonymous, Dalison, 22; 1 Hale P. C. 551; Anonymous, J. Kel. 67.

[8] 1 Gab. Crim. Law, 176; 2 East P. C. 508; 1 Hale P. C. 551; Rex *v.* Smith, Russ. & Ry. 417; Rex *v.* Jordan, 7 Car. & P. 432; Reg. *v.* Bird, 9 Car. & P. 44.

[9] The State *v.* McCall, 4 Ala. 643; Franco *v.* The State, 42 Texas, 276; 1 Gab. Crim. Law, 174; 3 Inst. 64; 4 Bl. Com. 227.

[10] Gibbon's Case, Foster, 107. And see Anonymous, 1 Anderson, 115.

[11] Rex *v.* Bailey, Russ. & Ry. 341.

[12] 4 Bl. Com. 227; 3 Inst. 64; Anonymous, 1 Hale P. C. 553.

[13] Reg. *v.* O'Brien, 4 Cox C. C. 398.

[14] Rex *v.* Roberts, Car. Crim. Law, 3d ed. 293; Rex *v.* Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491; Rex *v.* Rust, 1

hands placed outside of it, and then thrust in a bar for forcing open the inside shutter;[1] or to make a hole through a door with a centre-bit, whereby some of the chips fall in,[2] is insufficient; because neither the bar nor the centre-bit was to be employed about the ulterior felony.

§ 94. **Shooting in a Ball to kill.** — Whether, if one, intending a felonious homicide, discharges a ball from a gun outside the building, through a hole previously broken by him for the purpose; or, without a previous breaking, sends the ball into it, making thus both a breach and an entry by one impulse; he commits burglary, is left uncertain on the authorities.[3] On principle, there is less doubt; for the ball is meant and adapted to perpetrate the felonious homicide;[4] and, according to a general doctrine of the criminal law, a physical agent set in action by the party is considered the same as the party himself; even causing him to commit the offence in the locality where the agent acts, though himself personally absent.[5]

§ 95. **How far inside.** — The entry need not extend to any defined distance inside. Therefore when a boy, intending to steal, pushed in with his fingers a pane of glass, and simply the fore part of one finger had passed within the sash when he was apprehended, a conviction of him for burglary was held to be correct.[6]

Shutters. — If there are inside shutters, it is enough to pass in the hand for the unaccomplished purpose of opening one of them;[7] but the breaking of an outside shutter is not sufficient while the place remains unbroken.[8]

Chimney. — If the breaking is by coming in at the chimney,[9] it is not necessary, to constitute an entry, that the burglar should

Moody, 183; 3 Inst. 64; 1 Hawk. P. C. Curw. ed. p. 132, § 11, 12. And see Reg. *v.* O'Brien, 4 Cox C. C. 398.

[1] Rex *v.* Rust, 1 Moody, 183; Rex *v.* Roberts, Car. Crim. Law, 3d ed. 293.

[2] Rex *v.* Hughes, 1 Leach, 4th ed. 406, 2 East P. C. 491.

[3] 1 Hale P. C. 555; 1 Hawk. P. C. Curw. ed. p. 132, § 11; 2 East P. C. 490; 1 Gab. Crim. Law, 174; 1 Russ. Crimes, 3d Eng. ed. 795 and note.

[4] See 2 East P. C. 490; 1 Russ. Crimes, 3d Eng. ed. 795.

[5] Vol. I. § 110–112, 310, 651. **Sending Child in.** — It is the same if a man sends into the dwelling a child of tender years and innocent of any crime, but does not personally enter; he is still chargeable with burglary. 1 Hale P. C. 555, 556; 1 Russ. Crimes, 3d Eng. ed. 797.

[6] Rex *v.* Davis, Russ. & Ry. 499.

[7] Rex *v.* Perkes, 1 Car. & P. 300; Rex *v.* Bailey, Russ. & Ry. 341; Robert's Case, 2 East P. C. 487.

[8] The State *v.* McCall, 4 Ala. 643.

[9] Ante, § 91; Stat. Crimes, § 281, 312; post, § 98, note

pass out of the chimney into any room, or even pass below the chimney-piece; entering the chimney itself is sufficient.[1]

§ 96. **What must be broken.** — The breaking, as well as the entry, must be of something which constitutes a part of the dwelling-house.[2] Thus, —

Area Gate. — The area gate is not deemed a part of the mansion; and, where one by a skeleton-key made his way through this gate, and entered the dwelling at a door accidentally left open, he was held not to be guilty of burglary.[3]

§ 97. **Inside Doors — (Servant — Guest at Inn).** — But the breaking need not be of outside barriers; for if one is within, however lawfully, and there breaks an inner door through which he enters a room with burglarious intent,[4] — as where a servant lifts the latch and goes into a chamber[5] to commit murder[6] or a rape,[7] — it is burglary.[8] *A fortiori*, therefore, a guest at a hotel becomes chargeable with this offence if he leaves his own room and breaks into the room of another guest, for the purpose of committing a felony therein.[9]

§ 98. **Inside Breakings, continued.** — Likewise, where the breaking is of inner barriers, the same as where it is of outside ones, the breach must be of something which constitutes a part of the dwelling-house; as, —

Trunk or Box. — If it is merely of a trunk or box, from which goods are stolen, the transaction will not be burglarious.[10]

Fixtures. — "With respect," says Gabbett,[11] "to such fixtures as cupboards, presses, lockers, and the like, doubts have been entertained; and, in one case, the judges were divided upon the ques-

[1] Rex *v.* Brice, Russ. & Ry. 450; Donohoo *v.* The State, 36 Ala. 281.

[2] Stat. Crimes, § 281, 312.

[3] Rex *v.* Davis, Russ. & Ry. 322. And see Rex *v.* Paine, 7 Car. & P. 135; Rex *v.* Brown, 2 East, P. C. 487, 2 Leach, 4th ed. 1016, note.

[4] The State *v.* Scripture, 42 N. H. 485.

[5] Probably, if the chamber were his own lodging room, the case would be otherwise, because of his *quasi* interest in it. And see post, § 106. It is not burglary, says Hale, where "the opening of the door is within his trust." 2 Hale P. C. 354, 355; 1 Russ. Crimes, 3d Eng. ed. 794 and note.

[6] Anonymous, 1 Hale P. C. 554, J. Kel 67.

[7] Rex *v.* Gray, 1 Stra. 481.

[8] And see Stat. Crimes, § 290; Rex *v.* Johnson, 2 East P. C. 488; The State *v.* Wilson, Coxe, 439, 441; Rex *v.* Cassey, J. Kel. 63, 69; Denton's Case, Foster, 108. Contra, People *v.* Fralick, Hill & Denio, 63. The breaking must be before the felonious purpose ends. Adkinson *v.* The State, 5 Baxter, 569; but the felony need not be meant to be in the particular room broken. Rolland *v.* Commonwealth, 4 Norris, Pa. 66.

[9] The State *v.* Clark, 42 Vt. 629.

[10] 1 Hale P. C. 524, 554; The State *v.* Wilson, Coxe, 439, 441; 2 East P. C. 488.

[11] 1 Gab. Crim. Law, 172.

tion; but Mr. J. Foster is of opinion, that, in capital cases, such fixtures which merely supply the place of chests and other ordinary household utensils should, in favor of life, be considered in no other light than as mere movables;[1] though, in questions between the heir or devisee and the executor, these fixtures may, with propriety enough, be considered as annexed to and parts of the freehold. And Lord Hale[2] has expressed the same opinion; though he speaks doubtingly on the subject."[3]

§ 99. **Breaking Out.** — We have seen,[4] that, while both the breaking and the entry must be with felonious intent, both need not transpire on the same day. Now, in the order of time, must the breaking be first, and the entry afterward, which is the common case? or, is the offence equally burglary where the entry was without a breaking, and afterward the wrong-doer breaks out? Anciently there was doubt on this question;[5] therefore the statute of 12 Anne, stat. 1, c. 7, § 3, after mentioning the doubt, declared, "that, if any person shall enter into the mansion or dwelling-house of another by day or by night, without breaking the same, with an intent to commit felony; or, being in such house, shall commit any felony; and shall in the night-time break the said house to get out of the same," — it shall be burglary.[6] And though this statute is now repealed in England, the same provision in substance is contained in the later enactment of 7 & 8 Geo. 4, c. 29, § 11,[7] superseded by the present stat. 24 & 25 Vict. c. 96, § 51.[8] In the cases provided for by it, there need be no actual passing out from the premises, as the reader perceives; and a learned judge once made the very strong observation, that, if a thief, for instance, who was lawfully within, "even lifts the latch to get out of the house with the stolen prop-

[1] Foster, 109.

[2] 1 Hale P. C. 527, 555.

[3] See also 2 East P. C. 489. **Chimney in Cabin.** — The majority of the North Carolina court has held, that an entry at night through a chimney, into a log cabin in which the prosecutrix dwells, and stealing goods therein, will constitute burglary, although the chimney, made of logs and sticks, may be in a state of decay and not more than five and a half feet high. The State *v.* Willis, 7 Jones, N. C. 190.

[4] Ante, § 92.

[5] See 2 East P. C. 490; 1 Hale P. C. 554; Dalt. Just. c. 151, § 3; 4 Bl. Com. 227; 1 Gab. Crim. Law, 174; 1 Bennett & Heard Lead. Cas. 540.

[6] 1 Hawk. P. C. Curw. ed. p. 132, § 15; 2 East P. C. 489.

[7] 1 Russ. Crimes, 3d Eng. ed. 792.

[8] Which provides, that "whoever shall enter the dwelling-house of another with intent to commit any felony therein, or, being in such dwelling-house, shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary."

erty, that is a burglarious breaking out of the house."[1] This remark may be correct; but it carries the doctrine very far, and the question should be examined carefully. For, is the mere lifting of a latch, in such a case, a breaking of the dwelling-house?

How in our States. — The statute of 12 Anne is too recent (A.D. 1713) to be absolutely binding as common law in all our States,[2] though, where it is not, it must have its weight as declaratory of the sense of the English Parliament. Probably, in most of our States, the question is settled by statute. It is so, for example, in Georgia, where the words are, "breaking and entering *into*;" the consequence of which is, that a breaking *out* is not adequate in this State.[3]

§ 100. **Breaking Inner Doors without Entry.** — If the felon, to get out of the dwelling-house, should break an inner door, but not enter through it, the case would plainly be within the statute of Anne. But it seems not to be absolutely settled, whether, where the intent is not to get out, a person who has feloniously entered without a breaking commits burglary if he makes no entry through the inner door which he has broken. There are indications that the breaking alone in such circumstances may be deemed enough.[4] On the other hand, in an English case before the Central Criminal Court, Gurney, Commissioner, on consultation with Cresswell, J., held, that burglary is not committed by an entry, with felonious intent, into a dwelling-house without breaking, followed by a mere breaking (not affirmatively appearing to be to get out), without entry, of an inside door.[5] We have, in this case, a breaking, an entry, and a felonious intent; yet, not only is the breaking after the entry, but the breaking and entry are of different parts of the dwelling. If a breaking

[1] Erskine, J., in Reg. v. Wheeldon, 8 Car. & P. 747. And see 1 Hale P. C. 553; Rex v. Johnson, 2 East P. C. 488; Rex v. Callan, Russ. & Ry. 157; Rex v. McKearney, Jebb, 99, 1 Ben. & H. Lead. Cas. 540; Rex v. Lawrence, 4 Car. & P. 231.

[2] See ante, § 48, note; Bishop First Book, § 56; Deemed of force in Connecticut, The State v. Ward, 43 Conn. 489.

[3] White v. The State, 51 Ga. 285, 288, 289. And see The State v. McPherson, 70 N. C. 239; Brown v. The State, 55 Ala. 123.

[4] Anonymous, J. Kel. 67, seemingly supports this intimation; but the statement of the case in 1 Hale P. C. 554, shows that the facts did not raise the point. Erskine, J., might have held the breaking alone sufficient, as see Reg. v. Wheeldon, 8 Car. & P. 747; but probably his observations were founded on Stat. 7 & 8 Geo. 4, c. 29, § 11. And see Denton's Case, Foster, 108; Simson's Case, 1 Hale P. C. 527.

[5] Reg. v. Davis, 6 Cox C. C. 369.

out was not sufficient before the statute of Anne, this would not be sufficient after the statute any more than before; not being within the statutory terms.

II. *The Time.*

§ 101. **General Doctrine.** — The breaking and entering must both be in the night.[1]

Night. — What is the night is a question discussed in detail in Statutory Crimes.[2] It is there seen, that, at the common law, those portions of the morning and evening in which, while the sun is below the horizon, sufficient of his light is above to enable one reasonably to discern the features of a man, belong to the day; but, in this calculation, no account is to be taken of light reflected from the moon. This rule, however, has been modified in England and some of our States by statutes.

§ 102. **Breakings by Day.** — While this country was being settled, the statute of 1 Edw. 6, c. 12, was in force in England.[3] It provided, in § 10, that persons convicted, among other things, of the "breaking of any house by *day* or by night, *any person being then in the same house . . . thereby put in fear or dread*," should not be admitted to clergy; and Lord Hale treats this as creating a statutory burglary, which may be committed in the daytime. "It requires," he says, "1. An actual breaking of the house, and not an entry *per ostia aperta*. 2. An entry with intent to commit a felony, and so laid in the indictment.[4] 3. A putting in fear."[5] Kilty, as to Maryland, informs us that "there are, in the provincial records, some cases of prosecutions which appear to have been under this statute;"[6] but probably the re-

[1] Rex *v.* Segar, Comb. 401; Lewis *v.* The State, 16 Conn. 32; The State *v.* Bancroft, 10 N. H. 105; Reg. *v.* Polly, 1 Car. & K. 77. "It was held in 4 Edw. 6, that the breaking of the house shall not be burglary unless it is by night. Bro. Cor. 185. This is the first passage in any book where burglary is confined to a breaking in the night. In the old books it is said to be the same whether by night or by day. According to this late determination, Staunforde has formed his description of this crime, collected from the many decisions since the time of Britton and the Mirror, which is to this effect: 'Burglars are those who feloniously, in time of peace, break a house, church, walls, or towers, though they take nothing from thence; but then it must be done with intent to commit a felony, and in the night.'" 4 Reeves Hist. Eng. Law, 3d ed. 539.

[2] Stat. Crimes, § 276.

[3] A.D. 1547.

[4] Powlter's Case, 11 Co. 31 *b*.

[5] 1 Hale P. C. 548. And see ib. p. 562, 563.

[6] Kilty Report of Statutes, 164.

ports of none of the States contain any decisions on the question whether it is common law with us. It is not mentioned by the Pennsylvania judges, among the statutes in force in that State.[1]

§ 103. **Continued.** — There are some other old English statutory house-breakings which may be committed in the daytime, and to them similar observations apply.[2] So, in our own States, may be found statutes of the like sort.[3] The offences created by them differ, however, from common-law burglary in this essential particular, that the latter is a crime against the safety of the dwelling-house, perpetrated in hours of repose, when the vigilance of the occupants is, like their bodies, asleep.

III. *The Place.*

§ 104. **What.** — The breaking and entering must be into another's dwelling-house.[4]

Dwelling-house. — In the work on Statutory Crimes,[5] the meaning of the term "dwelling-house," within this definition, was minutely discussed. It was seen, that, to constitute a dwelling-house, persons must, at times at least, sleep beneath the roof; or, in other words, the place must be used for habitation. And there is a slight distinction between this word, which is the proper common-law term in burglary, and "house," which is the common-law term in arson. The term "dwelling-house" also includes the entire cluster of buildings, not separated by a pub-

[1] Report of the Judges, 3 Binn. 595, 620. And see ante, § 48, note.

[2] Lord Hale, 1 Hale P. C. 548, mentions the following: —

1. "Robbing a person by day or night, in his dwelling-house; the dweller, his wife, or children being in the house and not put in fear. This requires: 1. An actual breaking of the house. 2. An actual taking of something, but the persons need not be put in fear; and, by the statute of 5 & 6 Edw. 6, c. 9, clergy is in this case taken from the principal that enters the house; and, by the statute of 4 & 5 Phil. and M. c. 4, from the accessory before.

2. "Robbing a dwelling-house, by day or night, and taking away goods, none being in the house. This requires an actual breaking, and an actual taking of something, and without the latter it is not felony; but if accompanied with both, and the taking of goods be of the value of five shillings, it is excluded from clergy by 39 Eliz. c. 15." And see ante, § 100, note.

3. All these statutes mentioned by Lord Hale were, according to Kilty, used in the province of Maryland. Kilty Report of Statutes, 164, 166, 167, 169. But they are not mentioned by the judges as in force in Pennsylvania. Report of the Judges, 3 Binn. 595, 620, 622.

[3] People *v.* Taggart, 43 Cal. 81; Davis *v.* The State, 3 Coldw. 77; Butler *v.* People, 4 Denio, 68; Williams *v.* The State, 46 Ga. 212; Wood *v.* The State, 46 Ga. 322.

[4] The State *v.* Dozier, 73 N. C. 117.

[5] Stat. Crimes, § 277–288.

lic way, which are used for purposes connected with habitation. For example, it may include a barn.[1] In cases of doubt, the reader should consult the discussions in that volume.

§ 105. **Church.** — According to the old books, this offence may also be committed by breaking into a church;[2] for, says Lord Coke, it is the mansion-house of Almighty God.[3] There are few modern English cases,[4] and no American ones, in which this form of burglary has been relied upon; but the law is probably not obsolete. It is within some of our statutes.[5]

Walled Town. — Likewise the books tell us, that it is burglary feloniously to break into a walled town.[6]

§ 106. **Another's.** — The dwelling-house must be another's.

Innkeeper. — Doubtless, therefore, the keeper of an inn is not a burglar, when, with felonious intent, he breaks into a guest's chamber.[7]

Rooms of Lodgers. — Suppose, again, a person not an innkeeper lets to lodgers rooms in a building with one common entrance from without, and retains other rooms for his own habitation, — here, when a burglary is committed by a third person in a lodger's room, the indictment must describe the place as the dwelling-house of the landlord;[8] consequently the inference seems irresistible, "that, if he break open the apartments of his lodgers in the night and steal their goods, the offence will not be burglary."[9]

§ 107. **Further of Lodgers and Guests.** — On the other hand, we are not to infer, that, if the lodger or guest at an inn should

[1] Pitcher *v.* People, 16 Mich. 142.

[2] Anonymous, 1 Dy. 99 *a*, pl. 58; Dalton Just. c. 151, § 1, 4; 1 Hawk. P. C. Curw. ed. p. 133, § 17; 1 Russ. Crimes, 3d Eng. ed. 785; 2 East P. C. 491.

[3] 3 Inst. 64.

[4] In Reg. *v* Baker, 3 Cox C. C. 581, Alderson, B., observed: "I take it to be settled law, that burglary may be committed in a church at common law. I so held lately, on circuit."

[5] Wilson *v.* The State, 34 Ohio State, 199.

[6] 4 Bl. Com. 224; 1 Gab. Crim. Law, 169; 1 Hawk. P. C. Curw. ed. p. 129; ante, § 101, note.

[7] And see Rex *v.* Prosser, 2 East P. C. 502. Dalton, however, says, what can hardly be law at the present day: "A guest cometh to a common inn, &c., and the host appointeth him his chamber, and in the night the host breaketh into the guest's chamber to rob him; this is burglary." Dalton Just. c. 151, § 4.

[8] Stat. Crimes, § 287; 1 Russ. Crimes, 3d Eng. ed. 816, 817; Rex *v.* Hawkins, 2 East P. C. 501; Rex *v.* Picket, 2 East P. C. 501; Rex *v.* Witt, 1 Moody, 248; Rex *v.* Stock, 2 Leach, 4th ed. 1015, Russ. & Ry. 185, 2 Taunt. 339; Rex *v.* Margetts, 2 Leach, 4th ed. 930; Rex *v.* Ball, 1 Moody, 30; Rex *v.* Wilson, Russ. & Ry. 115; Crim. Proced. II. § 138.

[9] 1 Russ. Crimes, 3d Eng. ed. 820; Anonymous, J. Kel. 83, 84; 2 East P. C. 502. And see The State *v.* Curtis, 4 Dev. & Bat. 222; Rex *v.* Jobling, Russ. & Ry. 525; Rex *v.* Camfield, 1 Moody, 42; Rex *v.* Jarvis, 1 Moody, 7; Rex *v.* Wilson, Russ. & Ry. 115.

simply break out of his own chamber with burglarious intent, but commit no other breaking, his offence would be burglary. It seems sufficiently clear that it would not be, even in the strong case of the guest; "because," says Lord Hale, "he had a special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house."[1] And in New Hampshire, where the guest, besides passing out of his own room, entered the bar-room and there stole money, he was held not to be a burglar; since he had a legal right to go into the bar-room, — a decision, however, which rests somewhat upon the language of the statute.[2] But if, instead of entering the bar-room, he breaks into another guest's chamber to commit a felony, this is burglary.[3]

§ 108. **Entire Building let to Lodgers or Separate Families.** — The cases thus brought to view should be distinguished from those in which an entire building is let to lodgers or to separate families. Then the room or suit of rooms occupied by each lodger or family constitutes, of itself, the dwelling-house of such lodger or family.[4]

IV. *The Intent.*

§ 109. **Two Intents, &c.** — We saw, in the preceding volume, that in burglary there are two intents, — first, to break and enter; secondly, to commit, in the place entered, a felony.[5] What we are principally to consider, under our present sub-title, is this second or ulterior intent.

§ 110. **To commit Misdemeanor — (Assault — Maiming — Adultery).** — Therefore if the object of the breaking is to commit some offence which in law is only a misdemeanor; as an assault and battery,[6] or the cutting off of a person's ear,[7] or adultery

[1] 1 Hale P. C. 554; ante, § 104. Both Mr. East and Mr. Russell criticise this proposition; and seem of opinion, that, because the landlord could not commit burglary by breaking the guest's door, therefore the guest could commit it by breaking his own door. I confess myself unable to see the force of the reasoning. As well say, that, because a wife cannot commit it by breaking her husband's house, therefore the husband can by breaking his own house; or because one tenant in common cannot, therefore the other tenant can. See 2 East P. C. 503; 1 Russ. Crimes, 3d Eng. ed. 816. Here, again, Dalton states the doctrine contrary to our text. Dalton Just. c. 151, § 4.

[2] The State *v.* Moore, 12 N. H. 42.

[3] The State *v.* Clark, 42 Vt. 629.

[4] Stat. Crimes, § 287; Commonwealth *v.* Bowden, 14 Gray, 103. And see Commonwealth *v.* Thompson, 9 Gray, 108; Mason *v.* People, 26 N. Y. 200.

[5] Vol. I. § 342.

[6] 2 East P. C. 509.

[7] Commonwealth *v.* Newell, 7 Mass. 245.

where it is indictable only as a misdemeanor;[1] there is no burglary; though the act may be punishable as an attempt to commit a misdemeanor,[2] or otherwise.

Felony. — The intent must be to do some wrong which constitutes a felony,[3] either at common law or by statute;[4] but the felony intended need not be actually accomplished.[5]

§ 111. **Illustrations — (Servant embezzling—Rescue Goods from Excise Officer).** — When, therefore, a servant, whose business it was to sell goods, concealed in his master's house some money received for goods sold; and, after being discharged, broke into the house and took this money with criminal intent; he was held not to be guilty of burglary; because, as the money had never come into the master's possession, the carrying of it away could not be larceny.[6] And where the object of a breaking and entering was to rescue goods which had been seized by an excise officer, and the rescue as set forth in the indictment was not a felony, the transaction, so set forth, was held not to be burglary.[7]

§ 112. **Element of Attempt.** — Though burglary, like most other crimes, admits of attempts proper to commit it, which come short of the full offence, yet it is itself a species of attempt. And the reader will derive great help from consulting the title Attempt, in the first volume.[8] Thus, —

Repentance. — It follows from doctrines there set down,[9] that, if a man has gone far enough to complete the offence of burglary, his crime remains, though, before he commits the ulterior felony intended, he abandons his criminal purpose.

Fear. — Especially, therefore, if one by night breaks and enters a dwelling-house intending to commit a felony in it, and, after entering, desists through fear or because he is resisted, the crime of burglary is nevertheless complete.[10]

§ 113. **Intending Misdemeanor, but committing Felony.** — Again, to constitute an indictable attempt, the person attempting must

[1] The State *v.* Cooper, 16 Vt. 551. See Vol. I. § 768.

[2] Vol. I. § 759, 760.

[3] Anonymous, Dalison, 22; The State *v.* Eaton, 3 Harring. Del. 554; The State *v.* Wilson, Coxe, 439, 441; The State *v.* Bell, 29 Iowa, 316; People *v.* Jenkins, 16 Cal. 431.

[4] Stat. Crimes, § 139; Rex *v.* Knight, 2 East P. C. 510, 511; 1 Gab. Crim. Law, 192.

[5] Olive *v.* Commonwealth, 5 Bush. 376.

[6] Rex *v.* Dingley, cited 1 Show. 53, Gouldsb. 186, 2 Leach, 4th ed. 841.

[7] Rex *v.* Knight, 2 East P. C. 510.

[8] Vol. I. § 723 et seq.

[9] Vol. I. § 733.

[10] The State *v.* McDaniel, Winston, No. I. 249.

intend to do the particular thing which, in law, amounts to the ulterior crime.[1] Therefore, in burglary, when one undertakes to commit a misdemeanor, but accidentally he accomplishes a felony which he did not intend, still, although he is indictable for this felony done, yet, as it was not intended, he is not guilty of burglary.[2] The doctrine is, that there must be a particular intent to do a particular act, which act is a felony; and this intent must be proved to have existed in the mind of the defendant as matter of fact, not merely as matter of law.[3]

§ 114. **Impossible — (Fact unknown — Goods not in House).** — It seems to have been held, that, if there were facts unknown to the defendant, making it certain he could not commit the felony intended, — as, if his object were to steal the goods of A, and A had no goods in the dwelling-house,[4] — there is no burglary. This proposition, we saw in the first volume,[5] cannot be sustained on principle; and the authorities apparently supporting it are not sufficiently distinct or numerous to justify a departure from the true line of the law. Burglary being an attempt,[6] the principles governing attempts as explained in that volume will indicate the true solution of all questions of this sort.[7]

§ 115. **Presumption of Intent.** — Though there are felonies which men may commit in point of law, and do sometimes commit in point of fact, without meaning so high an offence, yet the presumption is, *prima facie*, that whatever they do they intend.[8] And if a man is indicted for breaking and entering with the intent, for example, to steal, and the proof shows that he did steal, it establishes also the intent charged; since the presumption is, that whatever was done, was intended.[9]

[1] Vol. I. § 727–730.

[2] Vol. I. § 736; 2 East P. C. 509; 1 Hale P. C. 561.

[3] And see Vol. I. § 729, 734, 735.

[4] Rex *v.* Jenks, 2 Leach, 4th ed. 774, 2 East P. C. 514; Rex *v.* Lyons, 2 East P. C. 497, 498, 1 Leach, 4th ed. 185.

[5] Vol. I. § 740–754.

[6] Vol. I. § 437.

[7] This case is, by analogy, like that of the attempt to commit an abortion, when, contrary to the belief of the parties, there is no fœtus or embryo in the womb; and the attempt to steal, by picking the pocket, when the experiment proves that there is nothing in the pocket to be stolen. We have seen, Vol. I. § 741, that the English judges have held both ways on this question; while some American courts have held the offence of indictable attempt to be committed under these circumstances. Vol. I. § 743, 744.

[8] Vol. I. § 734, 735; 2 East P. C. 510, 514.

[9] Crim. Proced. II. § 148; People *v.* Marks, 4 Parker, 153, where it was held, that, if, on an indictment for burglary with the intent to commit larceny, and for the commission of such larceny, the larceny itself is insufficiently charged, the prisoner may still be convicted of

§ 116. **Forms of Indictment as to Intent.** — To make this plain, we must repeat what properly belongs to the volumes of Criminal Procedure,[1] that the indictment for burglary may either allege an intent to do a felonious act in the place broken and entered; or, while silent concerning the intent, may allege that a particular felony was done there, — the pleader being permitted to elect which of these forms he will adopt.[2] The common method is to blend the two in one, and charge both an intent to do and an actual doing; and this blending has been held to be good.[3]

Verdict. — The conviction may be of so much as is sustained by the proof;[4] for example, of the felony charged, as committed in the place broken and entered, with an acquittal of the burglary.[5] And it makes no difference that the intent alleged is to steal, for instance, the goods of one person, and the actual stealing set out is of the goods of another; or that one or both of these persons be other than one alleged as the owner of the dwelling-house broken.[6] When the indictment sets out a breaking and entering, and an actual stealing, but no more, and the proof is simply of a breaking and entering with intent to steal, there can be no conviction; because this allegation and this evidence do not harmonize with or support each other.[7]

§ 117. **Further Illustrations — (Larceny — Other Felony).** — A larceny, however, is committed only when one intends to commit it.[8] But suppose the indictment for burglary, instead of alleging a larceny in the place broken and entered, charges the perpetration, in such place, of a felony of a different nature; and suppose the proof sustains the breaking and entering, and also shows, that the commission of the felony in the place entered

the burglary alone, the evidence being sufficient to establish the alleged intent.

[1] Crim. Proced. II. § 142 et seq.

[2] Vol. I. § 1062; 2 East P. C. 514; Commonwealth *v.* Brown, 3 Rawle, 207; Jones *v.* The State, 11 N. H. 269. See post, § 117; Crim. Proced. II. § 129, 142 et seq.

[3] Commonwealth *v.* Tuck, 20 Pick. 356; The State *v.* Brady, 14 Vt. 353; Stoops *v.* Commonwealth, 7 S. & R. 491; The State *v.* Squires, 11 N. H. 37; The State *v.* Moore, 12 N. H. 42; The State *v.* Ayer, 3 Fost. N. H. 301.

[4] Vol. I. § 796-799; Reg. *v.* Clarke, 1 Car. & K. 421.

[5] Rex *v.* Furnival, Russ. & Ry. 445; Reg. *v.* Reid, 1 Eng. L. & Eq. 595, 599, 15 Jur. 181; Jones *v.* The State, 11 N. H. 269; Commonwealth *v.* Hope, 22 Pick. 1; The State *v.* Cocker, 3 Harring. Del. 554; People *v.* Snyder, 2 Parker, 23.

[6] The State *v.* Brady, 14 Vt. 353; Reg. *v.* Clarke, 1 Car. & K. 421.

[7] Vol. I. § 803; Rex *v.* Furnival, Russ. & Ry. 445; Jones *v.* The State, 11 N. H. 269; Reg. *v.* Reid, 1 Eng. L. & Eq. 595, 599, 15 Jur. 181.

[8] Vol. I. § 207, 320, 342, 411; post, LARCENY.

was accidental, while the offender meant only a misdemeanor, — could he be convicted of the burglary, or merely of the minor felony? According to the doctrine stated in a section further back,[1] the conviction could be only of the minor felony; yet, in point of fact, none of the cases adjudged have presented this exact question; therefore it may be deemed open for future judicial discussion. If the intent was to commit a felony other than the one committed, in pursuance of which this one resulted accidentally, it seems plain he could be found guilty of the whole indictment.[2] Yet, again, it may be worthy of inquiry, whether, after all, it is sound law that an indictment for burglary is good which is silent as to the intent, and only charges a felony actually perpetrated, in those cases where such felony is of a nature to be legally committed without being intended.

V. *Statutory Breakings.*

§ 118. **In General.** — Something of statutory breakings is considered in the volume of Statutory Crimes.[3] It is sufficient to say here, in general terms, that in our States there are provisions of many forms and kinds against house and shop breakings, creating offences analogous to common-law burglary. In the interpretation of these enactments, the courts follow the analogies of the common law of burglary, giving to particular words the meanings they have therein acquired.[4] Some cases and adjudged points are here added in a note.[5]

[1] Ante, § 113.

[2] 2 East P. C. 514.

[3] Stat. Crimes, § 221, 233, 234, 240, 276–278, 313, 532, 533.

[4] The State *v.* Newbegin, 25 Maine, 500; Dutcher *v.* The State, 18 Ohio, 308; Stat. Crimes, § 141, 242; Wilson *v.* The State, 24 Conn. 57.

[5] 1. Tully *v.* Commonwealth, 4 Met. 357; Wilde *v.* Commonwealth, 2 Met. 408; Commonwealth *v.* Lindsey, 10 Mass. 153; Commonwealth *v.* McMonagle, 1 Mass. 517; Reg. *v.* Gilbert, 1 Car. & K. 84. And see post, § 119, note.

2. "Outhouse." — A statute in Connecticut provided a punishment for "every person who shall, in the night season, break and enter the store, shop, warehouse, or outhouse of another, whether parcel of any mansion-house or not, wherein goods, wares, or merchandise are deposited, with an intention to commit theft within the same." And it was held by the majority of the court, two judges dissenting, that a barn, disconnected from the mansion and standing alone, several rods distant, was an "outhouse" within the terms of this statute. See Stat. Crimes, § 291. "Goods," &c. — Likewise, that grain, the produce of the owner's farm, was "goods, wares, or merchandise," within the statute. By these words, said Hosmer, C. J., "is intended any personal property, of which larceny may be committed; and not those goods and chattels only, which are offered for sale." See Stat. Crimes, § 344. The State *v.* Brooks, 4 Conn. 446,

VI. *Remaining and Connected Questions.*

§ 119. **Consent.** — The effect of a consent to let in a burglar was considered in the preceding volume.[1]

449. **Intent.** — On a similar statute, the same tribunal held, that the offence is completed by the breaking and entering, with the felonious intent, the same as in common-law burglary, though the ulterior felony be not perpetrated. Wilson *v.* The State, 24 Conn. 57. "**Store**" — "**Shop.**" — A banking-house is a store or shop within the meaning of this statute. Ib. See Stat. Crimes, § 295.

3. **The Breaking, &c.** — A statute in Maine provided, that, "if any person, with intent to commit a felony, shall at any time break and enter any office, bank, shop, or warehouse, he shall be punished," &c. And it was held, that, when a store is lighted up, and the doors are merely latched in the ordinary manner, without any fastening to exclude admission, and the clerks are in the store ready to attend on customers; and, before eight o'clock in the evening, one carefully lifts the latch of the door and enters, intending to commit a larceny in the store, and does commit it, secretly, and without the knowledge of the attendants, the transaction does not constitute the offence provided for by the statute. "It was doubtless the design of the legislature," said Shepley, J., "to use the words break and enter, when defining this offence, in the sense in which they are used to define the crime of burglary. To constitute that offence, there must be proof of an actual breaking, or of that which is equivalent to it. Proof of an illegal entrance merely, such as would enable the party injured to maintain trespass *quare clausum*, will not be sufficient. Nor will proof of an entrance merely, for a purpose ever so felonious and foul, accompanied by any conceivable stratagem, be sufficient, if there be no actual breaking." The State *v.* Newbegin, 25 Maine, 500, 502, 503. And see Stat. Crimes, § 312.

4. "**Forcibly Break.**" — A statute of Ohio provided a punishment, "if any person shall, in the night season, wilfully, maliciously, and *forcibly* break and enter into any dwelling-house," &c. And it was held, that, notwithstanding the use of this word "forcibly," no other breaking is required than what would be sufficient to support a common-law indictment for burglary. Therefore where the inmates of the house were, on the night mentioned in the indictment, awakened by some one knocking at the door, and, in answer to the knocking, one of the inmates said "Come in;" and the person outside pulled the latch-string, but said he could not open the door; whereupon the person in the house, being deceived as to the intention of the person outside, opened the door, and let the burglar in, — this was held to be a sufficient breaking, by such outside person, to constitute the statutory offence. "For ages," said Spalding, J., "it has been considered, that the most dangerous sort of burglars were those who would seek to gain an entrance into one's mansion, not by violence, for that might be resisted, but by art, cunning, and circumvention." One judge dissented, deeming, "that, to constitute burglary under the statute, some degree of violence must be used in effecting an entry." Ducher *v.* The State, 18 Ohio, 308, 317, 318. Consult, in connection with this case, The State *v.* Henry, 9 Ire. 463. And see Stat. Crimes, § 312, 313; Vol. I. § 260–263.

[1] Vol. I. § 262; and see ante, § 118, note. **Consent of Adulterous Wife.** — It is strongly intimated in Ohio, that one who breaks and enters another's dwelling-house in the night, to commit therein adultery with the wife of him who, with his family, occupies it, cannot set up, in excuse for this breach and entry, the wife's consent previously granted. On the facts before the court, and the general question, Wright, J., observed: "We are not called upon to say, whether one entering a house, with the actual consent

§ 119 *a*. **Attempts.** — We have seen,[1] that burglary is itself a species of attempt. Still it admits of attempts less than burglary. Thus, if one breaks a dwelling-house, intending to commit a burglary in it, but is interrupted or desists before he effects an entry, he commits the indictable attempt.[2] Not every act short of breaking will be sufficiently proximate to the consummated burglary to be thus indictable.[3] Consequently, in Canada, it was held that, if persons go within thirteen feet of a dwelling-house in which they intend to commit a burglary, but do no more, this act is not "sufficiently proximate and directly tending to the offence" to be punishable.[4] Still, in many other ways short of a breaking, may the attempt be committed, as the reader will see who consults the title Attempt in our first volume.

§ 120. **Felony.** — Burglary is a common-law[5] felony;[6] and so the doctrines discussed in our first volume concerning principals, accessories,[7] and the like, apply to this offence. For example, —

Persons Assisting. — All who are present, concurring in what is done, being near enough to render aid, whether in fact they do any thing or not, are principal offenders;[8] but persons present who merely appear to concur, their object being to detect the guilty, are not criminal.[9] The doctrine, likewise, that for one to become a principal felon, his presence during the entire transaction is not necessary, provided he is near enough to assist during

of the wife of the occupant, with a view to illicit intercourse, could be punished, under the statute, for breaking and entering the house. No such case is before us. The real question is: Would Mrs. Mason's consent that the accused should visit her in the absence of her husband, or proof of his being in the habit of visiting her when her husband was absent, even for a criminal purpose, conduce to prove her permission to him to break and enter the house for such purpose when the husband was present and by her side? It is absurd to suppose so. . . . We incline to think a married woman incapable in law, by consent, to authorize a third person to break open and enter the house of her husband for an unlawful purpose. Such consent, though ever so formally given, could not justify or legalize an infraction of law, or sanctify an unlawful purpose. And will any one pretend, that the entering a man's house, with intent to commit adultery with his wife, with any consent, save only that of the husband, is a lawful entry?" Forsythe *v.* The State, 6 Ohio, 19, 23.

[1] Ante, § 112 et seq.

[2] Reg. *v.* Spanner, 12 Cox C. C. 155, 2 Eng. Rep. 208; Reg. *v.* Meal, 3 Cox C. C. 70; Reg. *v.* Bain, Leigh & C. 129, 9 Cox C. C. 98.

[3] People *v.* Lawton, 56 Barb. 126.

[4] Reg. *v.* McCann, 28 U. C. Q. B. 514.

[5] Rex *v.* Hanson, 1 Root, 59.

[6] 1 Hawk. P. C. Curw. ed. p. 129; 1 Hale P. C. 565.

[7] Vol. I. § 646–654, 662–680.

[8] Rex *v.* Bailey, Russ. & Ry. 341; Cornwal's Case, 2 Stra. 881; Hawkins's Case, cited 2 East P. C. 485.

[9] Rex *v.* Dannelly, Russ. & Ry. 310, 2 Marshall, 471. And see Reg. *v.* Johnson, Car. & M. 218.

a part of it,[1] applies here; so that, if he is present, for instance, at the breaking only, he is answerable as principal for what is done afterward in pursuance of the original plan, though personally absent.[2]

[1] Vol. I. § 649, 650.
[2] Reg. v. Jordan, 7 Car. & P. 432. See Vol. I. § 676.

For BURIAL, see SEPULTURE.
BURNING BUILDINGS, see ARSON AND OTHER BURNINGS.
CARNAL ABUSE, see RAPE AND THE LIKE. Also, Stat. Crimes, § 478–494
CARRYING WEAPONS, as to both law and procedure, see Stat. Crimes
CHALLENGING, see DUELLING.

CHAPTER IX.

CHAMPERTY AND MAINTENANCE.[1]

§ 121. Introduction.
122–130. Maintenance.
131–135. Champerty.
136–140. Buying and Selling Pretended Titles.

§ 121. **Nature of these Offences.** — Champerty and maintenance differ little in their nature, and a discussion of them under separate heads is unnecessary. They are scarcely of practical note in the criminal law; because indictments for them are seldom found. But in civil jurisprudence they come under frequent animadversion, contracts growing out of them being void.[2]

How Chapter divided. — Let us consider, I. Maintenance; II. Champerty proper; III. That species of the general offence known as the Buying and Selling of Pretended Titles.

I. *Maintenance.*

§ 122. **How defined.** — We have already found Blackstone's definition to be unobjectionable; namely, that maintenance is "an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party with money or otherwise to prosecute or defend it."[3]

Why indictable. — In a modern case it was said: "Combinations against individuals are dangerous in themselves, and prejudicial

[1] For matter relating to this title, see Vol. I. § 307, 541, 942, note. See, also, this vol. BARRATRY. For the pleading, practice, and evidence, see Crim. Proced. II. § 154 et seq. See, also, Stat. Crimes, § 232, 568.

[2] Brown *v.* Beauchamp, 5 T. B. Monr. 413; McCall *v.* Capehart, 20 Ala. 521; Arden *v.* Patterson, 5 Johns. Ch. 44; Webb *v.* Armstrong, 5 Humph. 379; Burt *v.* Place, 6 Cow. 431; Swett *v.* Poor, 11 Mass. 549; Grell *v.* Levy, 16 C. B. N. S. 73; Sayles *v.* Tibbitts, 5 R. I. 79.

[3] Vol. I. § 541. Hawkins says: "Maintenance is commonly taken in an ill sense, and, in general, seemeth to signify an unlawful taking in hand, or upholding of, quarrels or sides to the disturbance or hindrance of common right." 1 Hawk. P. C. Curw. ed. p 454. And see post, § 123.

to the public interest; and it is upon this principle that the doctrine of maintenance is founded. It is no wrong for an individual to prosecute his rights against another in a court of justice;[1] but it is, notwithstanding, criminal for others to maintain him in his suit; and for the reason, that such maintenance tends to oppression; that the weak would be endangered by combinations of the powerful and wealthy."[2]

§ 123. **Old Doctrine.** — In the old books, this offence occupies broader ground. Thus Hawkins, substantially followed by later writers,[3] defines maintenance to be "an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right." And he says it is of two kinds; namely, "*ruralis*, or in the country, as where one assists another in his pretensions to certain lands, by taking or holding the possession of them for him by force or subtilty,"[4] &c.; and "*curalis*, or in a court of justice," which last is the only kind embraced in the definition we have taken from Blackstone.[5]

§ 124. **Modern Doctrine — (Court of Justice).** — It is difficult to say how much of what we find on this subject in the old books is law at the present day; but the true doctrine seems to be, that maintenance, properly so called, can only be in a court of justice, or in reference to matter pending, or to be brought there.

Conspiracy in Nature of Maintenance. — Still there is a kind of indictable conspiracy, sometimes treated of under the head of maintenance, having no necessary reference to a court of justice. Persons guilty of it are described in Stat. 33 Edw. 1, stat. 2, to be "such as retain men in the country with liveries or fees for to maintain their malicious enterprises and to drown the truth."[6]

§ 125. **Fluctuations of Doctrine — (More of the Old Law).** — "It is curious, and not altogether useless," said Buller, J., "to see how the doctrine of maintenance has from time to time been received in Westminster Hall. At one time, not only he who had

[1] **Mistake of Fact.** — Nor is it maintenance to prosecute or defend a suit in which he believes, though erroneously, he has an interest. McCall *v.* Capehart, 20 Ala. 521.

[2] Stebbins, Senator, in Lambert *v.* People, 9 Cow. 578, 600. And see observations in Rust *v.* Larue, 4 Litt. 411, 426; Lathrop *v.* Amherst Bank, 9 Met. 489, 492.

[3] 1 Russ. Crimes, 3d Eng. ed. 175; 1 Gab. Crim. Law, 139.

[4] See Baley *v.* Deakins, 5 B. Monr. 159.

[5] 1 Hawk. P. C. Curw. ed. p. 454, § 1–3. In Brown *v.* Beauchamp, 5 T. B. Monr. 413, the court made an exposition of the law of maintenance based on Hawkins's.

[6] See post, § 174 and note.

laid out money to assist another in his cause, but he that by his friendship or interest saved him an expense which he would otherwise be put to, was held to be guilty of maintenance. Nay, if he officiously gave evidence, it was maintenance; so that he must have had a *subpœna*, or suppress the truth. That such doctrine, repugnant to every honest feeling of the human heart, should be soon laid aside, must be expected."[1] Hawkins, ever faithful in his search after old law, has set down, without dissent, not only what Buller, J., thus mentions as having been "soon laid aside," but much else of the like character; and some subsequent writers have followed him. Thus, as instances of maintenance, he mentions "speaking in the cause as one of the counsel with the party," "perhaps barely going along with him to inquire for a person learned in the law," "giving any public countenance to another in relation to the suit," and "soliciting a judge to give judgment according to the verdict." He admits, that a juror may exhort his companions to render the verdict which he deems right himself; and even, that a non-professional man may impart to his neighbor gratuitously, "friendly advice what action is proper for him to bring for the recovery of a certain debt," &c. "Yet it is said," he adds, "that a man of great power, not learned in the law, may be guilty of maintenance by telling another, who asks his advice, that he has a good title."[2]

§ 126. **Present Doctrine — Assisting with Money, &c.** — There is little risk in saying, that none of the absurdities spoken of in the last section would be supported by the courts of the present day, either in England or the United States. Perhaps, indeed, we can certainly set down as saved of the wreck of the old law, on this particular point, only what Hawkins terms "assisting another with money to carry on his cause; as by retaining one to be counsel for him, or otherwise bearing him out in the whole or part of the expense of the suit."[3] This, done under some circumstances, is indictable now. And the assistance rendered need not, evidently, be money; it may be any other thing valuable for accomplishing the object.[4]

§ 127. **When assist with Money.** — But even this general propo-

[1] Master *v.* Miller, 4 T. R. 320, 340, 2 H. Bl. 141.

[2] 1 Hawk. P. C. Curw. ed. p. 455, 456, § 5–11. As to the last point, see Burt *v.* Place, 6 Cow. 431.

[3] 1 Hawk. P. C. Curw. ed. 455. And see Lathrop *v.* Amherst Bank, 9 Met. 489; Campbell *v.* Jones, 4 Wend. 306.

[4] Stanley *v.* Jones, 7 Bing. 369.

sition of modern law demands qualifications. One is, "that, if a person has any interest in the thing in dispute, though on contingency only, he may lawfully maintain an action on it."[1] Thus, it is not maintenance for a vendor, with warranty, to uphold his vendee in a suit about the title.[2] And an heir apparent may do the same for an ancestor of lands in fee.[3] So, "wherever any persons claim a common interest in the same thing, as in a way, churchyard, or common, &c., by the same title, they may maintain one another in a suit relating to the same."[4]

§ 128. **When with Advice, &c.** — Another exception, stated by Hawkins, is, "that whoever is in any way of kin or affinity to either of the parties, so long as the same continues, or but related to him by being his godfather, may lawfully stand by him at the bar, and counsel and assist him, and also pray another to be of counsel to him; but he cannot justify the laying out of any of his own money in the cause unless he be either father, or son, or heir apparent to the party, or the husband of such an heiress."[5]

Landlords and Tenants — Servants — Poor Men. — And under a variety of circumstances, landlords and tenants, masters and servants, and even neighbors may assist one another.[6] So, "it seems to be agreed," says Hawkins, "that one may lawfully give money to a poor man to enable him to carry on his suit."[7]

General Conclusion. — The doctrine, in short, is, that, whenever there is a moral duty to assist another in a cause, the assistance rendered is no violation of law. And we need not wonder that there are differences of judicial opinion in the application of this doctrine.

§ 129. **How in Legal Reason.** — Let us, seeing how vague is the doctrine in the books of authority, look into the reason of the law, and, if possible, draw thence the true rule. The reader

[1] Buller, J., in Master *v.* Miller, 4 T. R. 320, 340; Lathrop *v.* Amherst Bank, 9 Met. 489; Hawk. P. C. Curw. ed. p. 456–458, § 14–17, 20–23; Gowen *v.* Nowell, 1 Greenl. 292; Knight *v.* Sawin, 6 Greenl. 361; Wickham *v.* Conklin, 8 Johns. 220; Cummins *v.* Latham, 4 T. B. Monr. 97, 105.

[2] Williamson *v.* Sammons, 34 Ala. 691; Goodspeed *v.* Fuller, 46 Maine, 141.

[3] 1 Hawk. P. C. Curw. ed. p. 457, § 18. And see Persse *v.* Persse, 7 Cl. & F. 279.

[4] 1 Hawk. P. C. Curw. ed. p. 458, § 24; Frost *v.* Paine, 3 Fairf. 111.

[5] 1 Hawk. P. C. Curw. ed. p. 458, § 26; Lathrop *v.* Amherst Bank, 9 Met. 489; Thallhimer *v.* Brinckerhoff, 3 Cow. 623.

[6] 1 Hawk. P. C. Curw. ed. p. 459, 460, § 27 et seq.; Thallhimer *v.* Brinckerhoff, 3 Cow. 623.

[7] 1 Hawk. P. C. Curw. ed. p. 460, § 26, s. p. Perine *v.* Dunn, 3 Johns. Ch. 508, 518; Anonymous, 3 Mod. 97. And see Bristol *v.* Dann, 12 Wend. 142.

observes, that, for a man to be guilty of maintenance, there must be another to be maintained; whence it follows, that the combination of forces to oppress lies at the foundation of the law of maintenance, the same as of the law of conspiracy. Therefore, in reason, if neither unlawful means nor unlawful ends are contemplated, the combination is not criminal, though it be to use the courts of the country for establishing or defending against a private claim. It is not pretended to be criminal in the person directly suing or defending; because the law permits him to carry on or defend a suit by any means not calculated to impose upon the tribunal; no other limit to his right to prosecute or defend being, in the nature of litigation, possible. And simply to give or lend aid to a man who, by lawful means, is seeking to accomplish a lawful end, can be no breach of social duty; it should be deemed no breach of legal, so long as we who live on this earth acknowledge ourselves to be bound together by the ties of brotherhood, or recognize the duty to love each his neighbor as himself. If the rich man is not shut out from the tribunals on the ground of the influence which riches bring, the poor man should not be for having found a friend.

§ 130. **Continued.** — But if one assists another, whether by advice or money, to deceive the court, or to obstruct in any other way the justice of the country, the two should be punished as criminals together. This is the doctrine of conspiracy, as will be seen on consulting our chapter on that subject. Beyond this, the courts ought not, whatever they may do in fact, to carry the law of maintenance.

II. *Champerty.*

§ 131. **How defined — Distinguished from Maintenance.** — Champerty differs from maintenance chiefly in this, that, in champerty, the compensation to be given for the assistance rendered is a part of the thing in suit, or some profit growing out of it;[1] whereas, in simple maintenance, the question of compensation

[1] Holloway *v.* Lowe, 7 Port. 488; Lathrop *v.* Amherst Bank, 9 Met. 489; Stevens *v.* Bagwell, 15 Ves. 139; Barnes *v.* Strong, 1 Jones Eq. 100; Wheeler *v.* Pounds, 24 Ala. 472. Hawkins defines champerty as "a species of maintenance," and says: It "is the unlawful maintenance of a suit, in consideration of some bargain to have part of the thing in dispute, or some profit out of it." 1 Hawk. P. C. Curw. ed. p. 463.

enters not much into the account.[1] Champerty, also, like the other form of maintenance, is an offence indictable at the common law.[2]

Suit commenced or not. — It may be committed, though there has been no suit actually commenced.[3]

§ 132. **Lawyer part of what he gets.** — A common instance of champerty is where an attorney at law agrees with a client to make collections, receiving for his compensation a part[4] or percentage[5] of the money collected. The agreement is void, and the attorney can recover of the client neither the stipulated com-

[1] According to Stat. 33 Edw. 1, stat. 2, — see post, § 174 and note, — "Champerters be they that move pleas and suits, or cause to be moved, either by their own procurement or by others, and sue them at their proper costs, for to have part of the land in variance, or part of the gains."

[2] Thurston *v.* Percival, 1 Pick. 415; Rust *v.* Larue, 4 Litt. 411, 425; Brown *v.* Beauchamp, 5 T. B. Monr. 413, 416; Douglass *v.* Wood, 1 Swan, Tenn. 393. And see Pechel *v.* Watson, 8 M. & W. 691; Fletcher *v.* Ellis, Hemp. 300; 2 Inst. 208. The statute of 28 Edw. 1, c. 11 — see 2 Inst. 563; 1 Hawk. P. C. Curw. ed. p. 465; Lathrop *v.* Amherst Bank, 9 Met. 489 — is perhaps a part of the common law of this country. It provides, "that no officer, nor any other, for to have part of the thing in plea, shall not take upon him the business that is in suit; nor none upon any such covenant shall give up his right to another; and, if any do, and he be attainted thereof, the taker shall forfeit unto the king so much of his lands and goods as doth amount to the value of the part that he hath purchased for such maintenance. And for this attainder, whosoever will, shall be received to sue for the king before the justices before whom the plea hangeth, and the judgment shall be given by them. But it may not be understood hereby, that any person shall be prohibit to have counsel of pleaders, or of learned men in the law, for his fee, or of his parents and next friends." And the earlier English enactment of 3 Edw. 1, c. 25, provided, that "no officer of the king, by themselves nor by other, shall maintain pleas, suits, or matters hanging in the king's courts, for lands, tenements, or other things, for to have part or profit thereof, by covenant made between them; and he that doth, shall be punished at the king's pleasure." However, the doctrine of maintenance and champerty stands well on the older English law, without these statutes. In Ohio, this offence is not indictable, simply because there are no common-law offences there. Key *v.* Vattier, 1 Ohio, 132. So in one or two of the other States. Vol. I. § 35. Wright *v.* Meek, 3 Greene, Iowa, 472; Newkirk *v.* Cone, 18 Ill. 449; Danforth *v.* Streeter, 28 Vt. 490; Richardson *v.* Rowland, 40 Conn. 565. And see note to this case in 2 Green Crim. 495. The question as to Texas was considered in McMullen *v.* Guest, 6 Texas, 275, to be doubtful. But afterward the court rejected the statutes and general doctrine as not applicable to this country, and held that an attorney may lawfully contract for a portion of the land recovered as his fee. Bentinck *v.* Franklin, 38 Texas, 458.

[3] Rust *v.* Larue, 4 Litt. 411. And see Martin *v.* Amos, 13 Ire. 201.

[4] Byrd *v.* Odem, 9 Ala. 755; Key *v.* Vattier, 1 Ohio, 132; Dumas *v.* Smith, 17 Ala. 305; In re Masters, 1 Har. & W. 348; Ex parte Yeatman, 4 Dowl. P. C. 304, 1 Har. & W. 510; Strange *v.* Brennan, 10 Jur. 649; Scobey *v.* Ross, 13 Ind. 117. And see Smith *v.* Paxton, 4 Dana, 391; Wilhite *v.* Roberts, 4 Dana, 172; Robison *v.* Beall, 26 Ga. 17; Miles *v.* Collins, 1 Met. Ky. 308.

[5] Elliott *v.* McClelland, 17 Ala. 206; Lathrop *v.* Amherst Bank, 9 Met. 489. And see Allen *v.* Hawks, 13 Pick. 79.

pensation nor any other. But the Kentucky court held, contrary to what is probably the general doctrine, that he may compel a payment of what his labor is worth, though not the agreed compensation.[1] The same court likewise held, that a covenant by a plaintiff, in an action of slander, to give the lawyer "a sum equal to one-tenth of the damages which might be recovered," for his services, is not champertous, "but is an obligation to pay a contingent fee made dependent on a recovery."[2] This very thin distinction the Alabama court did not make in a similar case, but held the contract void.[3]

§ 133. **Promise after Suit ended.** — After the suit is ended, however, the client may lawfully promise payment to his attorney of a part of what is collected.[4]

Assignment. — And the transfer of the subject-matter of the suit, to the attorney, by assignment, as security for his charges, is not deemed champertous, though an absolute sale might be.[5]

§ 134. **How in Principle.** — Thus the law stands in the books; but, in legal reason, the better statement of it, if not the law itself, is somewhat different. It is as follows. The repose of the community demands, that litigation be not stirred up beyond the natural and ordinary prosecution and defence of suits growing out of men's own transactions. From this truth sprang the old common-law rule, applicable in civil jurisprudence, that a *chose in action* cannot be assigned. This rule, the reader knows, was practically abolished long ago; though still the suit, after an assignment, must be brought in the name of the assignor.[6] Consequently it is not now champerty to make such an assignment. But to allow a man to carry on a suit for another at his own charges, and receive in compensation a part of what he gets, is more prejudicial to the public repose; consequently the law takes notice of such an act, and punishes it as champerty. In this view, the doctrines of champerty rest perhaps on a good foundation of

[1] Rust *v.* Larue, 4 Litt. 411, 425; Caldwell *v.* Shepherd, 6 T. B. Monr. 389, 392.

[2] Evans *v.* Bell, 6 Dana, 479; s. p. Major *v.* Gibson, 1 Patton & H. 48. And see Benedict *v.* Stuart, 23 Barb. 420; Ogden *v.* Des Arts, 4 Duer, 275; Lytle *v.* The State, 17 Ark. 608; Backus *v.* Byron, 4 Mich. 535.

[3] Holloway *v.* Lowe, 7 Port. 488. As to Texas, see note to the last section.

[4] Walker *v.* Cuthbert, 10 Ala. 213; Floyd *v.* Goodwin, 8 Yerg. 484.

[5] Anderson *v.* Radcliffe, Ellis, B. & E. 806.

[6] See Lewis *v.* Bell, 17 How. U. S. 616; McMicken *v.* Perin, 18 How. U. S. 507; Danforth *v.* Streeter, 28 Vt. 490; Deshler *v.* Dodge, 16 How. U. S. 622; Poe *v.* Davis, 29 Ala. 676.

reason; plainly they do, as applied to attorneys at law, and to other persons engaged in similar occupations.

§ 135. **Statutes.** — In some of the States, there are statutes regulating these matters.[1]

III. *The Buying and Selling of Pretended Titles.*

§ 136. **General Doctrine.** — Says Hawkins: "It seemeth to be a high offence at common law to buy or sell any doubtful title to lands known to be disputed, to the intent that the buyer may carry on the suit which the seller doth not think it worth his while to do, and on that consideration sells his pretensions at an under rate. And it seemeth not to be material, whether the title so sold be a good or bad one, or whether the seller were in possession or not, unless his possession were lawful and uncontested. For all practices of this kind are by all means to be discountenanced, as manifestly tending to oppression." [2]

How in our States. — The substance of this doctrine is pretty generally, not universally, accepted as common law in our States.[3]

Mistake of Fact. — The criminal intent being an element in all crime, the purchase and sale must be with knowledge of the impediment.[4] Then they are the subject of indictment.[5]

§ 137. **Conveyance of Land held adversely.** — This is one of the sources of the rule, that a conveyance of land held by another adversely to the grantor is void.[6]

[1] See Low *v.* Hutchinson, 37 Maine, 196; Sedgwick *v.* Stanton, 4 Kernan, 289; Newkirk *v.* Cone, 18 Ill. 449; Davis *v.* Sharron, 15 B. Monr. 64; Williams *v.* Matthews, 3 Cow. 252; Stoddard *v.* Mix, 14 Conn. 12; Arden *v.* Patterson, 5 Johns. Ch. 44; People *v.* Walbridge, 6 Cow. 512, 3 Wend. 120.

[2] 1 Hawk. P. C. Curw. ed. p. 470, § 1.

[3] Sessions *v.* Reynolds, 7 Sm. & M. 130; Dexter *v.* Nelson, 6 Ala. 68; Bledsoe *v.* Little, 4 How. Missis. 13, 24; Woodworth *v.* Janes, 2 Johns. Cas. 417; Van Dyck *v.* Van Beuren, 1 Johns. 345, 363; Cummins *v.* Latham, 4 T. B. Monr. 97, 105.

[4] Sessions *v.* Reynolds, supra; Verdier *v.* Simons, 2 McCord, Ch. 385; Alexander *v.* Polk, 39 Missis. 737; Rives *v.* Weaver, 36 Missis. 374.

[5] Swett *v.* Poor, 11 Mass. 549, 553; Everenden *v.* Beaumont, 7 Mass. 76, 78; Wolcot *v.* Knight, 6 Mass. 418, 421; Brinley *v.* Whiting, 5 Pick. 348, 359. And see, as to ignorance of the impediment, Etheridge *v.* Cromwell, 8 Wend. 629; Preston *v.* Hunt, 7 Wend. 53; Bullard *v.* Copps, 2 Humph. 409; Gass *v.* Malony, 1 Humph. 452; Hassenfrats *v.* Kelly, 13 Johns. 466; Hendricks *v.* Andrews, 7 Wend. 152.

[6] Co. Lit. 214; Gibson *v.* Shearer, 1 Murph. 114; Bledsoe *v.* Little, 4 How. Missis. 13, 24; Martin *v.* Pace, 6 Blackf. 99. Another reason is, that there could be no livery of seisin by a person out of possession. Kercheval *v.* Triplett, 1 A. K. Mar. 493; Dexter *v.* Nelson, 6 Ala. 68 And see Vol. I. § 541.

Stat. 32 Hen. 8. — But the rule rests also on some early English statutes, the principal one of which is 32 Hen. 8, c. 9.[1] It directs, in § 1, the enforcement of the laws against champerty, maintenance, and other "misdemeanors" mentioned; in § 2 enacts, "that no person, &c., shall from henceforth bargain, buy, or sell, or by any ways or means obtain, get, or have any pretensed rights or titles, or take, promise, grant, or covenant to have any right or title of any person, &c., in or to any manors, lands, tenements, or hereditaments (except such person, &c., their ancestors, or they by whom he or they claim the same, have been in possession of the same, or of the reversion or remainder thereof, or taken the rents or profits thereof, by the space of one whole year next before the said bargain, covenant, grant, or promise made), upon pain," &c. And the remaining sections add further provisions against maintenance and the like, with further limitations of the doctrine, not necessary to be mentioned here.

Not in all our States. — In Ohio, a State in which there are no common-law crimes,[2] it is held, that, as this enactment is not received there, such conveyances are valid.[3] So also it is in Illinois.[4]

§ 138. **Other States.** — While some courts have denied that the statute of 32 Hen. 8, c. 9, is common law in this country,[5] the doctrine perhaps better established accepts it.[6] In various States

[1] Co. Lit. 369 *a*; 1 Hawk. P. C. Curw. ed. p. 471. And see on this point, and as to what is an adverse possession: Burhans *v.* Burhans, 2 Barb. Ch. 398; Poor *v.* Horton, 15 Barb. 485; Vrooman *v.* Shepherd, 14 Barb. 441; Klock *v.* Hudson, 3 Johns. 375; Whitaker *v.* Cone, 2 Johns. Cas. 58; Gillet *v.* Hill, 5 Wend. 532; Allen *v.* Smith, 6 Blackf. 527; Wellman *v.* Hickson, 1 Ind. 581; Michael *v.* Nutting, 1 Ind. 481; Tabb *v.* Baird, 3 Call, 475; Tomb *v.* Sherwood, 13 Johns. 289; Whitesides *v.* Martin, 7 Yerg. 384; Pickens *v.* Delozier, 2 Humph. 400; Bullard *v.* Copps, 2 Humph. 409; Mitchell *v.* Churchman, 4 Humph 218; Wilcox *v.* Calloway, 1 Wash. Va. 38; Brinley *v.* Whiting, 5 Pick. 348; Gibson *v.* Shearer, 1 Murph. 114; Ross *v.* Blair, 1 Meigs, 525; Williams *v.* Hogan, 1 Meigs, 187; Mitchel *v.* Lipe, 8 Yerg. 179; Cawsey *v.* Driver, 13 Ala. 818; Hibbard *v.* Hurlburt, 10 Vt. 173; Lane *v.* Shears, 1 Wend. 433; Scofield *v.* Collins, 3 Cow. 89; Van Dyck *v.* Van Beuren, 1 Johns. 345; Wood *v.* McGuire, 21 Ga. 556; Kinsolving *v.* Pierce, 18 B. Monr. 782; Williams *v.* Council, 4 Jones, N. C. 206; Pepper *v.* Haight, 20 Barb. 429; McCoy *v.* Williford, 2 Swan, Tenn. 642; Kincaid *v.* Meadows, 3 Head, 188.

[2] Ante, § 131, note; Vol. I. § 35.

[3] Hall *v.* Ashby, 9 Ohio, 96. Contra, in Kentucky, Ewing *v.* Savary, 4 Bibb, 424; Kercheval *v.* Triplett, 1 A. K. Mar. 493, and most other States.

[4] Willis *v.* Watson, 4 Scam. 64; Fetrow *v.* Merriwether, 53 Ill. 275.

[5] Sessions *v.* Reynolds, 7 Sm. & M. 130; Hall *v.* Ashby, 9 Ohio, 96; Poyas *v.* Wilkins, 12 Rich. 420; Cain *v.* Monroe, 23 Ga. 82; Harring *v.* Barwick, 24 Ga. 59; Webb *v.* Camp, 26 Ga. 354.

[6] Kilty Rep. Stats. 232; Brinley *v.* Whiting, 5 Pick. 348, 353. And see Vol. I. § 541, note.

the subject has been legislated upon; in some, in confirmation of the English law, and in abrogation of it in others.[1]

§ 139. **How the Statutes construed.** — Statutes of this kind are construed strictly;[2] and a case, to be indictable, must fall within the mischief to be remedied, as well as within their words.[3]

Judicial Sales — What others. — They do not apply to judicial and official sales,[4] or to conveyances to *cestuis que trust*, or to such as are made in pursuance of a contract executed before their enactment,[5] or made when there was no adverse possession.[6]

§ 140. **Sale after Judgment.** — And in Kentucky it is held, that a sale of land by one who has recovered judgment for it, though he has not taken possession, is not within the statute; because "the object of that act was to prevent speculations in '*pretended*' titles, whereby purchasers were enabled to harass occupants with lawsuits."[7]

Mortgage — Will — Surrender — Near Relatives. — The statute applies to mortgages;[8] but not to wills, being without the mischief to be remedied;[9] and, for the same reason, it does not, in

[1] See, among other cases, Alexander *v.* Polk, 39 Missis. 737; Cassedy *v.* Jackson, 45 Missis. 397; Webb *v.* Bindon, 21 Wend. 98; Crary *v.* Goodman, 22 N. Y. 170; Sherwood *v.* Burr, 4 Day, 244.

[2] Stat. Crimes, § 193. For sundry points adjudged on Stat. 32 Hen. 8, c. 9, see 1 Hawk. P. C. Curw. ed. p. 472 et seq.

[3] Leonard *v.* Bosworth, 4 Conn. 421; Stat. Crimes, § 220, 232.

[4] Stat. Crimes, § 232; Frizzle *v.* Veach, 1 Dana, 211; Violett *v.* Violett, 2 Dana, 323, 325; Dubois *v.* Marshall, 3 Dana, 336; Tuttle *v.* Hills, 6 Wend. 213; Anderson *v.* Anderson, 4 Wend. 474; Truax *v.* Thorn, 2 Barb. 156; Hoyt *v.* Thompson, 1 Seld. 320; Williams *v.* Bennett, 4 Ire. 122; Sims *v.* Cross, 10 Yerg. 460; McGill *v.* McCall, 9 Ind. 306; Saunders *v.* Groves, 2 J. J. Mar. 406; Cook *v.* Travis, 20 N. Y. 400. But see Martin *v.* Pace, 6 Blackf. 99.

[5] Saunders *v.* Groves, 2 J. J. Mar. 407; Moss *v.* Scott, 2 Dana, 271, 274; Cardwell *v.* Spriggs, 7 Dana, 36; Castleman *v.* Combs, 7 T. B. Monr. 273, 276; Swartwout *v.* Johnson, 5 Cow. 74; Poage *v.* Chinn, 4 Dana, 50; Chiles *v.* Jones, 4 Dana, 479; Allen *v.* Smith, 1 Leigh, 231, 248; Whitesides *v.* Martin, 7 Yerg. 384; Lipe *v.* Mitchell, 2 Yerg. 400, 403; Lane *v.* Shears, 1 Wend. 433. And see Dickinson *v.* Burrell, Law Rep. 1 Eq. 337.

[6] Norton *v.* Sanders, 1 Dana, 14, 17; Chiles *v.* Conley, 9 Dana, 385. See Parks *v.* Hendricks, 11 Wend. 442.

[7] Jones *v.* Chiles, 2 Dana, 25, 35. Otherwise of a sale while the suit is pending. Bryant *v.* Ketchum, 8 Johns. 479; Hendricks *v.* Andrews, 7 Wend. 152; Murray *v.* Ballou, 1 Johns. Ch. 566, 570; Murray *v.* Lylburn, 2 Johns. Ch. 441. And see Parks *v.* Hendricks, 11 Wend. 442; Swett *v.* Poor, 11 Mass. 549; Webb *v.* Bindon, 21 Wend. 98. But the Alabama court has held, that a sale of lands *pendente lite*, by one in possession, is not void at the common law. Camp *v.* Forrest, 13 Ala. 114. See also Harrell *v.* Bunting, 3 Hawks, 86; Cockell *v.* Taylor, 15 Eng. L. & Eq. 101, 15 Beav. 103; Lewis *v.* Bell, 17 How. U. S. 616.

[8] Redman *v.* Sanders, 2 Dana, 68, 69; Wash *v.* McBrayer, 1 Dana, 565, 566. Otherwise in Connecticut. Leonard *v.* Bosworth, 4 Conn. 421.

[9] Clay *v.* Wyatt, 6 J. J. Mar. 583; May *v.* Slaughter, 3 A. K. Mar. 505, 509.

Vermont, apply to an assignment of a mortgage.[1] Neither does it prevent a surrender of land to the person in possession,[2] or, perhaps, a conveyance between near relations.[3]

[1] Converse *v.* Searls, 10 Vt. 578.

[2] Williams *v.* Council, 4 Jones, N. C. 206. For further points decided under the *Kentucky* statutes, see Clay *v.* Wyatt, 6 J. J. Mar. 583; Young *v.* McCampbell, 6 J. J. Mar. 490; Violett *v.* Violett, 2 Dana, 323, 326; Redman *v.* Sanders, 2 Dana, 68, 70; Aldridge *v.* Kincaid, 2 Litt. 390; Young *v.* Kimberland, 2 Litt. 223, 225; Castleman *v.* Combs, 7 T. B. Monr. 273; Wilhite *v.* Roberts, 4 Dana, 172; Conn *v.* Manifee, 2 A. K. Mar. 396; Baley *v.* Deakins, 5 B. Monr. 159; Adams *v.* Buford, 6 Dana, 406; Griffith *v.* Dickin, 4 Dana, 561; Smith *v.* Paxton, 4 Dana, 391; Hopkins *v.* Paxton, 4 Dana, 36; Dubois *v.* Marshall, 3 Dana, 336; Lilard *v.* McGee, 3 J. J. Mar. 549. As to *partial eviction* from the land, see Mitchell *v.* Churchman, 4 Humph. 218; Pickens *v.* Delozier, 2 Humph. 400; Hyde *v.* Morgan, 14 Conn. 104; Van Dyck *v.* Van Beuren, 1 Johns. 345.

[3] Morris *v.* Henderson, 37 Missis. 492. See ante, § 128.

CHAPTER X.

CHEATS AT COMMON LAW.[1]

§ 141, 142. Introduction.
143, 144. General Doctrine.
145–158. Nature of the Symbol or Token.
159, 160. Nature of the Fraud involved.
161–164. Public Cheats.
165–168. Remaining and Connected Questions.

§ 141. **What for this Chapter.** — It is proposed, in this chapter, to discuss cheats at the common law, and under Stat. 33 Hen. 8, c. 1, § 1, 2, which is common law with us; leaving cheats under the statutes of false pretences for a separate chapter.

§ 142. **Order of this Chapter.** — We shall consider I. The General Doctrine; II. The Nature of the Symbol or Token; III. The Nature of the Fraud involved, — as to private cheats respectively; IV. Public Cheats; V. Remaining and Connected Questions.

I. *The General Doctrine.*

§ 143. **How defined.** — A cheat at the common law is a fraud accomplished through the instrumentality of some false symbol or token, of a nature against which common prudence cannot guard, to the injury of one in some pecuniary interest.[2]

[1] See, for matter relating to this title, Vol I. § 571, 581, 582, 584, 585. See also this volume, FALSE PRETENCES. For the pleading, practice, and evidence, see Crim. Proced. II. § 157 et seq. And see Stat. Crimes, § 450–452.

[2] Vol. I. § 571. The books are nearly bare of definitions of cheat; Hawkins has the following: "It seemeth that those cheats which are punishable at common law may, in general, be described to be deceitful practices in defrauding, or endeavoring to defraud, another of his known right by means of some artful device, contrary to the plain rules of common honesty: as, by playing with false dice; or by causing an illiterate person to execute a deed to his prejudice, by reading it over to him in words different from those in which it was written; or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment, &c.; or by suppressing a will; or by levying a fine in another's name, or suing out an execution upon a judgment for him, or acknowledging an action in his name, without his priv-

Stat. 33 Hen. 8. — We saw, while announcing this definition in the first volume, that the statute of 33 Hen. 8, c. 1, § 1 and 2, merely affirmed the common-law doctrine, also that it is a part of the common law of this country.[1]

ity, and against his will; in which cases, by some good opinions, the record may be vacated." I Hawk. P. C. Curw. ed. p. 318, § 1. The accuracy of this definition has been questioned. See Hawk. ut sup., note; Burn Just. 28th ed. by Chit. tit. Cheat. Blackstone says: "Cheating is an offence more immediately against public trade; as that cannot be carried on without a punctilious regard to common honesty, and faith between man and man. Hither, therefore, may be referred that prodigious multitude of statutes which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence also of *breaking the assize* of bread, or the rules laid down by the law, and particularly by the statutes 31 Geo. 2, c. 29, 3 Geo. 3, c. 11, and 13 Geo. 3, c. 62, for ascertaining its price in every given quantity, is reducible to this head of cheating; as is likewise, in a peculiar manner, the offence of selling by *false weights and measures*. The punishment of bakers breaking the assize was anciently to stand in the pillory, by statute 51 Hen. 3, stat. 6; and, for brewers (by the same act), to stand in the tumbrel or dung-cart; which, as we learn from Doomsday Book, was the punishment for knavish brewers in the city of Chester so early as the reign of Edward the Confessor. But now the general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment; though the easier and more usual way is by levying, on a summary conviction, by distress and sale, the forfeitures imposed by the several acts of Parliament. Lastly, any deceitful practice, in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory." 4 Bl. Com. 157, 158. It is not my purpose, in this note, to discuss the definition of Hawkins, or inquire why Blackstone did not attempt definition here, as he did in treating of almost every thing else. Obviously the early existence, in England, of statutes covering this ground of cheat tended to prevent that accurate examination of the common law out of which definitions grow. Whether my own definition is accurate the reader must judge for himself.

[1] It recites, § 1, that "many light and evil-disposed persons, not minding to get their living by truth, &c., but compassing and devising daily how they may unlawfully obtain and get into their hands and possession goods, chattels, and jewels of other persons, for the maintenance of their unthrifty living, and also knowing, that, if they came to any of the same goods, chattels, and jewels by *stealth*, then they, being thereof lawfully convicted according to the laws of this realm, shall die therefore; have now of late falsely and deceitfully contrived, devised, and imagined *privy tokens* and *counterfeit letters* in other men's names, unto divers persons their special friends and acquaintances, for the obtaining of money, goods, chattels, and jewels of the same persons, their friends and acquaintances, by color whereof the said light and evil-disposed persons have deceitfully and unlawfully obtained and gotten great substance of money, goods, chattels, and jewels into their hands and possession, contrary to right and conscience:" and for the remedy of these evils enacts, § 2: "That, if any person or persons, &c., falsely and deceitfully obtain, or get into his or their hands or possession, any money, goods, chattels, jewels, or other things of any other person or persons, by color and means of any *such false token* or *counterfeit letter* made in another man's name, as is aforesaid, that then every person and persons so offending," &c., — adding provisions the effect of which is to make the offence an indictable misdemeanor. See 1 Hawk. P. C. Curw. ed. p. 319, § 4; the author, how-

§ 144. **Distinction.** — The reader should bear in mind, that, though under our statutes against obtaining goods by false pretences, to be discussed in another chapter, the cheat is sometimes indictable when brought about by a mere lie, it is otherwise of the common-law cheat, to be considered in this chapter.

Symbol or Token. — Under the ancient common law, and under this statute of Hen. 8, there must be some symbol or token (such, for example, as the "counterfeit letters" mentioned in the statute) to give effect, character, and credibility to the verbal falsehood. For we have seen,[1] that a fraud accomplished by a mere spoken[2] lie is not at the common law indictable.

II. *The Nature of the Symbol or Token.*

§ 145. **Not mere Words — Illustrations.** — A man's mere words are neither symbols nor tokens. Therefore a naked lie is not alone such a false symbol or token as comes within the law.[3] Thus, if one obtains a credit of goods, by falsely representing himself to be in trade, and to keep a grocery shop;[4] or by misstating his pecuniary condition and circumstances;[5] or, if he gets into his possession his own note, by pretending to the holder he wishes to look at it, and then refuses to deliver it back;[6] or,

ever, taking too much freedom with the words of the statute in transferring it to his page.

[1] Vol. I. § 582; post, § 145.

[2] It does not under all circumstances make any difference that the lie is written. See post, § 147.

[3] Rex *v.* Bryan, 2 Stra. 866; Hartmann *v.* Commonwealth, 5 Barr, 60. In the former of these cases, the indictment charged, as the report states, "that the defendant came to the shop of Langley, a mercer, and affirmed she was a servant of the Countess of Pomfret, and was sent by her from St. James's to fetch silks for the queen, endeavoring thereby to defraud the said Langley; whereas, in fact, she was no servant of the Countess of Pomfret, nor was sent upon the queen's account." After conviction, on a motion in arrest of judgment, it was suggested to the court, by way of sustaining the indictment, that the case was one of 'fraud concerning the public traffic; and, though no harm was done, yet an indictment would lie, as in the case in 1 Vent. 304 [Rex *v.* Armstrong], of an indictment for a conspiracy to charge a man with a bastard child, when there really was no child, so that the party could not suffer. *Sed per Curiam*, There the conspiracy was the crime, and an indictment will lie for that, though it be to do a lawful act; this is no more than telling a lie, and, no instance being shown to maintain it, the judgment must be arrested."

[4] Commonwealth *v.* Warren, 6 Mass. 72.

[5] The State *v.* Sumner, 10 Vt. 587, decided, however, under a statute.

[6] People *v.* Miller, 14 Johns. 371. **Larceny.** — Query, whether this would not be larceny of the note under statutes making promissory notes the subject of larceny. See also Commonwealth *v.* Hearsey, 1 Mass. 137.

if feigning to have money ready to pay a debt which has been sued before a justice of the peace, he obtains from the plaintiff a receipt, and an order on the justice to discharge the judgment on his paying the costs;[1] or, if he falsely tells another he has been sent to him by a third person for money, and so gets it;[2] or, if, in selling an inferior kind of gum, he says it is gum Seneca, when he knows it is not;[3] or, in selling a horse he knows to be blind, wilfully says it is a sound one;[4] or thus sells bull beef for steer beef;[5] or, if he knowingly disposes of wrought gold, under the sterling alloy, for gold of the true standard weight;[6] or, if he pretends an article of goods, he is delivering, weighs more, or measures more, than he knows it really does;[7] — in these and the like cases, he but utters a naked falsehood, unconfirmed by symbol or token, and so he is not indictable at the common law, or under the statute of 33 Hen. 8, c. 1. What he says is a mere false affirmation.

§ 146. **False Measure.** — While, therefore, if a person selling an article by measure falsely says, "Here are so many bushels," he merely tells an untruth, and is not indictable at the common law, though the purchaser takes it on this representation, — still, if he measures it out to the buyer, the measure is a token, and, it being false, he commits a criminal cheat.[8] "The reason" of the distinction, said Wilmot, J., is, that in the former case "it is in everybody's power to prevent this sort of imposition; whereas a *false measure* is a general imposition upon the public which cannot be well discovered."[9]

§ 147. **Bank Check.** — Again, if a man fraudulently effects a purchase, by drawing and delivering in payment his check on a bank in which he keeps no account, he thus merely puts his

[1] People *v.* Babcock, 7 Johns. 201.

[2] Rex *v.* Grantham, 11 Mod. 222. Anonymous, 6 Mod. 105; Reg. *v.* Jones, 2 Ld. Raym. 1013, 1 Salk. 379; Reg. *v.* Hannon, 6 Mod. 311.

[3] Rex *v.* Lewis, Say. 205. See Rex *v.* Haynes, 4 M. & S. 214.

[4] The State *v.* Delyon, 1 Bay, 353.

[5] Rex *v.* Botwright, Say. 147.

[6] Rex *v.* Bower, Cowp. 323.

[7] Rex *v.* Wheatley, 1 W. Bl. 273; s. c. nom. Rex *v.* Wheatly, 2 Bur. 1125, 1129; Rex *v.* Driffield, Say. 146; Rex *v.* Osborn, 3 Bur. 1697; Rex *v.* Channell, 2 Stra. 793; Rex *v.* Dunnage, 2 Bur. 1130; Pinkney's Case, 2 East P. C. 818.

[8] 2 East P. C. 820; People *v.* Gates, 13 Wend. 311, 319; Pinkney's Case, 2 East P. C. 818, 820; Rex *v.* Burgaine, 1 Sid. 409; Commonwealth *v.* Warren, 6 Mass. 72, 73.

[9] Rex *v.* Osborn, 3 Bur. 1697. Receiving grain on storage for hire, or buying grain, by false weights, is a common-law cheat, indictable. People *v.* Fish, 4 Parker, 206.

false representation in writing, the check is no token, and he is not indictable at the common law.[1]

False Marks of Weight. — But, if a baker of bread for the army puts on his barrels of bread false marks of weight, whereby the public is defrauded, he commits the crime.[2] Says Mr. East: "Wilders,[3] a brewer, was indicted for a cheat in sending to one Hicks, a publican, so many vessels of ale, *marked* as containing such a measure, and writing a letter to Hicks assuring him that they did contain that measure, when in fact they did not contain such measure, but so much less, &c. The indictment was quashed upon motion, as containing no criminal charge. Yet this was thought by the court, in Rex *v.* Wheatly,[4] a strong case; and Mr. Justice Foster doubted it, because he considered that the vessels, being marked as containing a greater quantity than they really did, were *false tokens*. Possibly, however, the court in deciding the case of Wilders thought that those marks, not having even the semblance of any public authority, but being merely the private marks of the dealer, did in effect resolve themselves into no more than the dealer's own affirmation that the vessels contained the quantity for which they were marked."[5] There

[1] Rex *v.* Jackson, 3 Camp. 370; Rex *v.* Lara, 2 Leach, 4th ed. 647, 2 East P. C. 819, 827, 6 T. R. 565; Rex *v.* Wavell, 1 Moody, 224.

[2] Respublica *v.* Powell, 1 Dall. 47. See also The State *v.* Wilson, 2 Mill, 135, 139.

[3] Rex *v.* Wilders, cited by Lord Mansfield in 2 Bur. 1128.

[4] Rex *v.* Wheatley, 1 W. Bl. 273; s. c. nom. Rex *v.* Wheatly, Bur. 1125, 1 Bennett & Heard Lead. Cas. 1.

[5] 2 East P. C. 819, 820. Rex *v.* Wheatly, mentioned in the text, has been regarded as a leading case, settling previous conflicts in the law of indictable cheat. See Wright *v.* People, Breese, 66. The head-note of the case, as it stands in the reports of Burrow and of Blackstone, is "Delivering less beer than contracted for as the due quantity is not indictable." The case is also published as a leading case in 1 Ben. & H. Lead. Cas. 1; and there Mr. Bennett has given the following head-note: "An offence, to be indictable, must be one that tends to injure the public. Defrauding one person only, without the use of false weights, measure, or tokens, and without any conspiracy, is, at common law, only a civil injury, and not indictable." This case, being found in the three several reports mentioned, is presumed to be accessible to every reader, and I shall not, therefore, discuss it further. **Separating Condition of Bond from Penalty.** — In Wright *v.* People, supra, the Illinois court, taking the doctrines of this case for its guide, held it not to be an indictable fraud at the common law for the holder of a bond to separate the condition from the penalty. Said Smith, J.: "The act of separating the condition, written underneath the obligation, which was to determine the time of payment, and liability of the parties to it, cannot be considered as an act which common prudence might not have guarded against. It might have been avoided in various ways, — by taking from Wright [the defendant] an instrument expressive of

is abundant principle, in the criminal law, for distinguishing between a mark put on a particular package, intended for a particular individual, and a brand or mark on a package to be cast into the open market, to mislead the public generally.[1]

§ 148. **Commercial Paper.** — While, if, on the one hand, a man draws his own check on a bank where he has no deposit, he merely writes a falsehood, as just explained;[2] yet, if, on the other hand, he pays for an article he is purchasing in the paper of another man, representing it to be good, but knowing it to be worthless, this paper is a false token, and he is indictable for the cheat. Accordingly we saw, in the previous volume,[3] that forgery itself, at the common law, is but a common-law cheat, or attempt to cheat; this form of the offence having been distinguished from the other, under the separate name of forgery. And so when one obtains money or goods from another, paying him therefor in a piece of paper purporting to be a bank-note, but knowing there is no such bank;[4] or, there being such a bank, knowing the bill to be counterfeit, as having the name of a fictitious cashier countersigned to it;[5] or worthless, as not having the signatures of the bank officers attached to it, and the defect not obvious on account of the bill being worn;[6] or the bill being,

the condition upon which the obligation was given, instead of having it underwritten; or by having the condition inserted in the body of the obligation, according to the most common and usual method in practice." p. 67. Moreover, the learned judge considered that cases like this had already been provided for by the statutes; therefore there was less reason for holding them indictable at the common law. The line, let me observe, between the indictable and unindictable wrong, is, in the facts of cases, indistinct and uncertain at several places in our unwritten criminal law; but it is going very far to say, that it is not a thing forbidden by the principles of this law to mutilate a written instrument which may be the foundation of a lawsuit, even though the instrument might have been so framed as not to be so easily mutilated.

[1] See Vol. I. § 232, 235, 243–245, 250–252.

[2] Ante, § 147.

[3] Vol. I. § 572.

[4] Commonwealth *v.* Speer, 2 Va. Cas. 65; The State *v.* Patillo, 4 Hawks, 348.

[5] Commonwealth *v.* Boynton, 2 Mass. 77. And see Reg. *v.* Philpotts, 1 Car. & K. 112.

[6] The State *v.* Grooms, 5 Strob. 158, decided on the South Carolina act, of 1791, against cheating and swindling, construed to be in affirmance of the common law. The words of it are: "Any person who shall overreach, cheat, or defraud, by any cunning, swindling acts and devices, so that the ignorant or unwary who are deluded thereby lose their money and other property, shall forfeit," &c. **Threats.** — And the court held, that it is swindling within this enactment, to obtain horses from an ignorant man, by threats of a criminal prosecution, and also by threats of his life. The State *v.* Vaughan, 1 Bay, 282; but not swindling to sell a blind horse as a sound one. The State *v.* Delyon, 1 Bay, 353.

within his knowledge, otherwise false;[1] he commits a common-law cheat. And probably he does so, if he knowingly passes for value a genuine note of a broken bank, the note being therefore worthless, though this point appears not to be absolutely decided.[2] Such a case, however, is within the statutes against getting money or goods by false pretences.[3]

§ 149. **False Order.** — So while one who, as we have seen,[4] procures money or goods of another, on the false oral representation that he has been sent for them, is not indictable at the common law, on account of there being no token; yet, if he presents a piece of paper, which purports falsely to be an order from such other, this paper is a token, and he is answerable criminally for the cheat.[5]

Counterfeit Discharge. — And, when a man committed to jail on an attachment for contempt in a civil cause, counterfeited a pretended discharge, as from his creditor to the sheriff and jailer, and an affidavit annexed; whereby he procured his release; the English judges held him guilty of a common-law misdemeanor, even though, under the circumstances, if the order had been genuine it would have been a nullity, not authorizing the sheriff or his officer to set him at liberty.[6]

§ 150. **Putting on Market Goods with False Stamps.** — Moreover, whatever be the doctrine in regard to a man himself marking the weight or measure of an article on the package of it which he sells to a particular purchaser;[7] yet, generally, if he cheats in trade by knowingly vending or thrusting into the market goods with false stamps upon them, he violates this branch of our law, the packages, with their marks, being deemed false tokens: "as in Edwards' Case,"[8] says Mr. East,[9] "where cloth was sold with Alneager's seal counterfeited thereon; or, as in Worrell's case,[10] where there was a general seal or mark of the trade on cloth of a certain description or quality, which was deceitfully counterfeited." An examination, in Tremaine, of the

[1] The State *v.* Stroll, 1 Rich. 244; The State *v.* Patillo, 4 Hawks, 348; Lewis *v.* Commonwealth, 2 S. & R. 551.

[2] Rex *v.* Flint, Russ. & Ry. 460.

[3] Commonwealth *v.* Stone, 4 Met. 43; Rex *v.* Spencer, 3 Car. & P. 420; post, FALSE PRETENCES.

[4] Ante, § 145.

[5] Reg. *v.* Thorn, Car. & M. 206.

[6] Rex *v.* Fawcett, 2 East P. C. 862.

[7] Ante, § 147.

[8] Rex *v.* Edwards, Trem. P. C. 103.

[9] 2 East P. C. 820. And see People *v.* Gates, 13 Wend. 311, 319.

[10] Rex *v.* Worrell, Trem. P. C. 106.

indictments in the two cases here referred to, shows, that, in both, the defendants themselves counterfeited and put on the marks, which were of a somewhat public nature, and then sold the articles to the public generally.[1]

§ 151. **Lie and False Token further distinguished.** — There is another class of cases, in which only the breadth of a hair lies between the indictable and the unindictable. Thus, —

Acting for Another — Misrepresenting Self. — It is, we repeat, not a common-law cheat to get money of a man by the false assertion of having been sent for it by another,[2] or otherwise acting for another;[3] although such false assumption may furnish, in proper circumstances, ground for an indictable conspiracy.[4] Yet where an indentured apprentice got himself enlisted as a soldier, and thus obtained a bounty, representing that there was no impediment, no doubt was entertained of the act being a crime, though the conviction was quashed for want of proof of the indentures.[5] The proposition is a nice one, that the boy himself was a token; and, appearing without his indentures, a false token; yet probably this case has sufficient foundation of principle. When one tells a bare lie, the person is put on his inquiry; when he presents a token or symbol, the person looks at that. The boy showed himself; and, by appearing without master or indentures, apparently free, forestalled inquiry. And there is an old case, in which an indictment against one for falsely representing himself to be a merchant, and producing a commission as such, whereby he obtained another's goods, was sustained.[6]

§ 152. *False Personation:* —

In General. — And this leads to the inquiry, how far the common law makes it criminal to cheat by falsely personating another. In England there are at present statutes regulating this subject;[7] so there are in some of our States. Likewise a false

[1] And see ante, § 147.

[2] Ante, § 145.

[3] See Reg. *v.* White, 2 Car. & K. 404, 1 Den. C. C. 208.

[4] Rex *v.* Hevey, 1 Leach, 4th ed. 229, Russ. & Ry. 407, note, 2 East P. C. 856.

[5] Rex *v.* Jones, 1 Leach, 4th ed. 174, 2 East P. C. 822. The *punishment*, in this case, seems to have been provided for by statute; but, as stated in the text, the indictment was at common law. This is the true procedure in such cases. Stat. Crimes, § 166. See also, as illustrative, Rex *v.* Hanson, Say. 229.

[6] Rex *v.* Govers, Say. 206.

[7] 2 East P. C. 1004; 2 Russ. Crimes, 3d Eng. ed. 540; Vol. I. § 758; Rex *v.* Cramp, Russ. & Ry. 327; Rex *v.* Parr, 1 Leach, 4th ed. 434, 2 East P. C. 1005; Rex *v.* Brown, 2 East P. C. 1007.

representation of one's personality, or using a fictitious name, may be a statutory false pretence.[1]

Wife pretending Single. — In an old case, the court refused to quash an indictment against a woman, for getting board and lodging by falsely affirming herself to be single, and of the name of Fuller, when she was married, and of the name of Hanson. And Ryder, C. J., said: "We are inclined to the opinion, that the indictment is good."[2]

§ 153. **Infant pretending of Age.** — Gabbett observes: "If a minor go about the town, and, pretending to be of age, defraud many persons by taking credit for quantities of goods, and then insist on his nonage, the person injured may prosecute him as a common cheat."[3] But this is put somewhat upon the repetitions of the act, and the numbers injured.[4]

§ 154. **Generally.** — Mr. East appears to deem false personating indictable at the common law, though in most of the cases there was a conspiracy.[5] But of cases other than of conspiracy he cites only Dupee's,[6] where the court refused to quash an indictment charging, that Dupee personated the clerk of a justice of the peace, to extort money from several persons, in order to procure their discharge from misdemeanors for which they stood committed. He observes: "It might probably have occurred to the court, that this was something more than a bare endeavor to commit a fraud by means of falsely personating another: it was an attempt to pollute and render odious the public justice of the kingdom, by making it a handle and pretence for corrupt practices."[7]

§ 155. **How in Principle.** — Perhaps the true view may be, that, if a man merely says he is Mr. So-and-so, another person, he cannot be deemed a false token or symbol of such person; but, otherwise, if he puts on apparel representing him, or changes his

[1] Commonwealth *v.* Drew, 19 Pick. 179.

Rex *v.* Hanson, Say. 229. "There is a precedent of an indictment against a married woman for pretending to be a widow, and as such executing a bail-bond to the sheriff for one arrested on a bailable writ. This perhaps was considered as a fraud upon a public officer in the course of justice." 2 East P. C. 821. The precedent is Rex *v.* Blackbourne, Trem. P. C. 101.

[3] 1 Gab. Crim. Law, 204, 205, referring to Barl. 100.

[4] See ante, § 147.

[5] 2 East P. C. 1010. And see Vol. I. § 468.

[6] Rex *v.* Dupee, 2 Sess. Cas. 11.

[7] 2 East P. C. 1010, 1011. And see 2 Russ. Crimes, 3d Eng. ed. 539, 540.

appearance, or does any thing which amounts to what is figuratively called holding out false colors.

§ 156. *Misreading a Writing.*

Cheat — Forgery. — Very near the line also, dividing the indictable and unindictable, is the misreading of a writing to an illiterate person, and thereby obtaining his signature to it.[1] Ordinarily, in such a case, the offender is not indictable for a cheat,[2] and according to what is probably the better doctrine, he never is for a forgery;[3] though the reading was corruptly wrong, made so with a view to defraud. But the proposition has been strongly insisted on, that, where the person executing the writing is unable to read it himself, and trusts to the other, this circumstance completes the act as a common-law cheat.[4]

§ 157. *The Token as Public or not:* —

In what Sense Public — Private. — Another principle was mentioned in the preceding volume. The token must be of such a nature, that, according to the customs and order of society, every man is supposed to place confidence in it; while, on the other hand, it need not be, as some of the cases seem to imply, of a public character.[5] The statute of 33 Hen. 8, c. 1, § 2,[6] has the words "*such* false token;" which, taken in connection with § 1, mean, "*privy* false token;" so that, whatever doubt on this point may have existed before its enactment, there should be none now.[7] A "*privy* false token" is indictable, the same as one not privy.

False Dice. — But even the more ancient common law was plainly enough so. For, besides the various tokens mentioned in the foregoing sections, whereof most are private, we have the playing with false dice, always held to be an indictable cheat.[8] To say that dice are public tokens is absurd.

Forgery — Conspiracy. — Again, in the common-law cheat of forgery,[9] it is expressly decided that the instrument need not be public;[10] and in conspiracies the like principle prevails.[11]

[1] See ante, § 143, note.

[2] The State *v.* Justice, 2 Dev. 199.

[3] Vol. I. § 584.

[4] Vol. I. § 584; Hill *v.* The State, 1 Yerg. 76; 1 Hawk. P. C. Curw. ed. p. 318, § 1; post, § 160.

[5] Vol. I. § 585.

[6] Ante, § 143.

[7] See 1 Hawk. P. C. Curw. ed. p. 320, 321; Anonymous, 6 Mod. 105, note.

[8] Anonymous, 6 Mod. 105; Anonymous, 7 Mod. 40; McKean, C. J., in Respublica *v.* Teischer, 1 Dall. 335, 338; Savage, C. J., in People *v.* Gates, 13 Wend. 311, 319.

[9] See ante, § 148.

[10] Vol. I. § 585.

[11] Post, CONSPIRACY.

Promissory Notes. — Therefore it is impossible to recognize, as sound general doctrine, a proposition laid down in one or two States, that the promissory notes of individuals, differing from those of banks,[1] are not tokens of a kind to render indictable the act of cheating by them, when the party represents them to be genuine and valuable, knowing them to be otherwise.[2]

§ 158. *Legal Validity:* —

Not as in Forgery. — When the false token is a written instrument, it need not be such as, if genuine, would be of legal validity.[3] The rule is otherwise in forgery;[4] or, rather, when the law elevated, as before explained,[5] certain cheats to the special crime of forgery, it did not include this one.

III. *The Nature of the Fraud involved.*

§ 159. **Acted on Confidence in Token.** — To constitute the complete cheat, in distinction from a mere indictable attempt to cheat, the person defrauded must have acted on his confidence in the token or symbol employed. Though the false device was used, if the individual operated upon withheld belief in it, yielding to what was asked from other considerations, there was no cheat by means of the device, but merely an attempt to cheat.[6] What authorities we have on this point are cases decided under the statutes against false pretences; to which title the reader is referred for many other points applicable equally under the present title.[7]

§ 160. **Thing obtained — (With General Views.)** — The statute of 33 Hen. 8, c. 1, § 1 & 2,[8] has the words, "obtain, &c., *any money, goods, chattels, jewels, or other things.*"[9] Though this provision is broad, obviously the common law, which it did not supersede, is broader, — how much broader, and where the boundary line here runs between the indictable and unindictable,

[1] Ante, § 148.

[2] The State *v.* Patillo, 4 Hawks, 348; The State *v.* Stroll, 1 Rich. 244; Middleton *v.* The State, Dudley, S. C. 275. For the general doctrine, see ante, § 148.

[3] Rex *v.* Fowle, 4 Car. & P. 592; Rex *v.* Fawcett, 2 East P. C. 862. And see post, CONSPIRACY.

[4] Vol I. § 572; post, FORGERY.

[5] Ante, § 148.

[6] See Commonwealth *v.* Davidson, 1 Cush. 33; Rex *v.* Dale, 7 Car. & P. 352; People *v.* Stetson, 4 Barb. 151; People *v.* Haynes, 14 Wend. 546.

[7] Post, FALSE PRETENCES.

[8] Ante, § 143.

[9] As to the interpretation of the words "other things," see Stat. Crimes, § 245, 246.

are questions on which we have little light. Hawkins says: "It seemeth, that those [cheats] which are punishable at common law may, in general, be described to be deceitful practices, in defrauding or endeavoring to defraud another of his known right, by means of some artificial device, contrary to the plain rules of common honesty: as, by playing with false dice;[1] or by causing an illiterate person to execute a deed to his prejudice by reading it over to him in words different from those in which it was written;[2] or by persuading a woman to execute writings to another, as her trustee, upon an intended marriage, which in truth contained no such thing, but only a warrant of attorney to confess a judgment, &c.; or by suppressing a will; or by levying a fine in another's name, or suing out an execution upon a judgment for him, or acknowledging an action in his name, without his privity, and against his will."[3] Doubtless we may obtain some light on this point by consulting the title "Conspiracy;" because any injury to another for which conspirators are indictable would seem in reason sufficient to constitute a criminal cheat, when effected by a false symbol or token.[4]

IV. *Public Cheats.*

§ 161. **General Doctrine.** — Obviously the before-described cheats are no less indictable when their victims are numerous, than when they fall only on one person. On the other hand, it is general doctrine in the criminal law, that, where many are injured, the injurious act merits heavier reprobation than when it extends to but a single victim.[5]

§ 162. **Analogous Wrongs not properly Cheats.** — Aside from this, Russell,[6] East,[7] and some other writers[8] include, under the title of cheat, various offences in the nature of frauds against the public justice,[9] such misconduct as the rendering of false accounts by persons in office,[10] such nuisances as the thrusting into market

[1] Ante, § 157.

[2] Ante, § 156.

[3] 1 Hawk. P. C. Curw. ed. p. 318, § 1. See, as to this passage, ante, § 143, note.

[4] And see Rex v. Pettit, Jebb, 151; Reg. v. Blacket, 7 Mod. 39; Anonymous, Comb. 16.

[5] See ante, § 147, and the reference at the end of the section.

[6] 2 Russ. Crimes, 3d Eng. ed. 275.

[7] 2 East P. C. 821.

[8] See 1 Gab. Crim. Law, 201; 1 Hawk. P. C. Curw. ed. p. 322.

[9] 2 Russ. Crimes, 3d Eng. ed. 275; 2 East P. C. 821.

[10] 2 Russ. Crimes, 3d Eng. ed. 275.

of unwholesome provisions or supplying them to prisoners of war,[1] and such private indictable injuries as malpractice by a physician.[2] Russell even places under this title the indictable misdemeanor of spreading false news.[3] But while there is nothing gained by undertaking to be too nicely philosophical in our division of subjects in the criminal law, still it is a little loose to contemplate all these varying wrongs as cheats.

§ 163. **Public Cheats proper — (Personating Officer — Using Public Trust to defraud, &c.).** — Yet, as belonging to cheats proper, we have the doctrine that one may make himself criminal by a fraud committed in personating an officer,[4] or by taking advantage of a public trust or confidence,[5] when he would not be so if he had accomplished the same wrong by some other means. "Thus, where Bembridge and Powell were indicted for enabling persons to pass their accounts with the pay officer in such a way as to enable them to defraud the government, it was objected that it was only a private matter of account, and not indictable; but the court held otherwise, as it related to the public revenue."[6]

§ 164. **Statutes regulating Trade and Manufacture.** — There are statutes, ancient and modern, English and American, regulating trade and manufacture, a violation whereof may be deemed a public cheat. Such, for illustration, is the statute of 28 Edw. 1, stat. 3, c. 20, the material part of which is "that no goldsmith . . . shall from henceforth make . . . any manner of vessel, jewel, or any other thing, of gold or silver, except it be of good and true alloy, that is to say, gold of a certain touch and silver of the sterling alloy, or of better, at the pleasure of him to whom the work belongeth; and that none work worse silver than money. And that no manner of vessel of silver depart out of the hands of the workers, until it be essayed by the wardens of the craft; and, further, that it be marked with the leopard's head. And that they work no worse gold than of the touch of Paris."

[1] 2 East P. C. 821; 2 Russ. Crimes, 3d Eng. ed. 276; 1 Hawk. P. C. Curw. ed. p. 322.

[2] 2 Russ. Crimes, 3d Eng. ed. 277; 1 Crim. Law, 203, 204.

[3] 2 Russ. Crimes, 3d Eng. ed. 278.

[4] Vol. I. § 587.

[5] Rex *v.* Bower, Cowp. 323; 2 East P. C. 821.

[6] 1 Gab. Crim. Law, 204, referring to Rex *v.* Bembridge, cited 6 East, 136. S. C. reported 3 Doug. 327.

V. *Remaining and Connected Questions.*

§ 165. **Aggravations — Merger — Misdemeanor or Felony.** — In the preceding volume, was considered the general rule, with its limitations, "that a criminal person may be holden for any crime, of whatever nature, which can be legally carved out of his act. He is not to elect, but the prosecutor is."[1] According to this rule, if a man commits a cheat, yet if what he does amounts also to an offence of another name, he may still be indicted for the cheat, should the prosecuting power choose. The limit is, that generally the same precise act cannot be both a felony and a misdemeanor.[2] Now, a cheat is a misdemeanor;[3] therefore, if a particular act, coming fully within the definition of cheat, is such as the law makes also a felony, the indictment must be for the felony.[4]

§ 166. **Larceny and Cheat compared and distinguished.** — With this view, let us advert to a distinction between larceny and cheat. When a man beguiles another by false tokens into delivering to him goods which he means to appropriate to his own use, he commits larceny, if, by the understanding, only the possession, not the property, in the goods, is to pass; consequently, as larceny is felony, he cannot be indicted for the misdemeanor

[1] Vol. I. § 791.

[2] Vol. I. § 787, 815.

[3] 2 East P. C. 838.

[4] See this illustrated Vol. I. § 787, 788, 815. And see Rex *v.* O'Brian, 7 Mod. 378. In a case before the Superior Court of Buffalo, N. Y., on demurrer to an indictment for trading by false weights, the offence being charged as a misdemeanor, the court held that it should have been charged as a felony, and sustained the demurrer. Said Clinton, J.: "If this misdemeanor at common law is now a statutory felony, the misdemeanor is merged. False weights are false tokens. They were held to be so long before the statute of cheats. The revision of 1813 (1 R. L. 410, § 1) provided for cheats by false pretences only; but the Revised Statutes broadened the definition so as to include the common-law offences, and declared them all felonies. Those statutes now provide, that 'every person who, with intent to cheat or defraud another, shall designedly, by color of any false token or writing, or by any other false pretence,' 'obtain from any person any money, personal property, or valuable thing,' shall be guilty of a felony. This statute increases the number of indictable cheats, and makes them felonies. I do not see how any cheat can now be regarded as a mere misdemeanor." People *v.* Fish, 4 Parker, 206, 212. The intimation by the judge, that the Revised Statutes, as quoted by him, covered the whole ground of common-law cheat, was obviously an oversight. They covered perhaps the greater part of it; but plainly, not all. It is not clear that all courts would hold to the doctrine of merger, precisely as laid down in this case. The question is a nice one, on which judicial opinion is not quite uniform or distinct. And see Vol. I. § 812–815; post § 166.

of a cheat. But if the understanding is, that the property in the goods is to pass to him, he may be indicted for the act as a cheat, because the transaction does not then constitute larceny. And it is the same if goods are obtained thus by a statutory false pretence;[1] except where the difficulty is removed by the statute itself, as it is in England since Stat. 7 & 8 Geo. 4, c. 29, § 53; now 24 & 25 Vict. c. 96, § 88.

§ 167. **Punishment.** — A common-law cheat, being a misdemeanor, is punishable as explained in the preceding volume.[2]

§ 168. **Attempts.** — We have, in the books, little concerning attempts to cheat, where the fraud is not actually effected. But certain kinds of these attempts are included in the separate offence of forgery;[3] and there can be no doubt, that, generally, there may be indictable attempts to commit this crime, as well as any other.[4] Indeed, the courts have sustained indictments for the attempt to commit the statutory offence of obtaining goods by false pretences;[5] and plainly the same doctrine applies to common-law cheats.

[1] Vol. I. § 583, 585; 2 East P. C. 816; 1 Hale P. C. 506, 507. And see the note to the last section.

[2] Vol. I. § 933, 940–947; 2 East P. C. 838.

[3] Vol. I. § 572.

[4] And see Reg. *v.* Marsh, 1 Den. C. C. 505, Temp. & M. 192, 3 New Sess. Cas. 699, 13 Jur. 1010; Rex *v.* Bryan, 2 Stra. 866.

[5] Post, § 488.

For CHILD MURDER, see Stat. Crimes.
CONCEALMENT OF BIRTH, see Stat. Crimes.
COIN, see COUNTERFEITING.
COMBUSTIBLE ARTICLES, see Vol. I. § 1097 et seq.
COMMON BARRATRY, see BARRATRY.
COMMON DRUNKARD, see Stat. Crimes.
COMMON GAMING-HOUSE, see GAMING-HOUSE, Vol. I. § 1135 et seq. And see GAMING and GAMING-HOUSE in Stat. Crimes.
COMMON NUISANCE, see NUISANCE, Vol. I. § 1071 et seq.
COMMON SCOLD, see Vol. I. § 1101 et seq.
COMPOUNDING CRIME, see Vol. I. § 709 et seq.
CONFISCATIONS, see Vol. I. § 816 et seq.

CHAPTER XI.

CONSPIRACY.[1]

§ 169, 170. Introduction.
171–179. General Doctrine.
180–190. Element of the Law of Corrupt Combinations.
191–195. Element of the Law of Attempt.
196–235. Applied to Particular Relations and Things; as —
198–214. Defrauding Individuals.
215–218. Injuring them otherwise.
219–225. Disturbing Government and Justice.
226. Creating Breaches of the Peace.
227–229. Creating Public Nuisances, &c.
230–233. Concerning Wages and the like.
234, 235. Otherwise injuring both Public and Individuals
236–238. Statutory Conspiracies.
239, 240. Remaining and Connected Questions.

§ 169. **Scope of the Chapter.** — Conspiracy, we shall see, is, in one of its branches, a species of Attempt; and, in a philosophical division of the law, this branch would be placed under the title Attempt. Another branch has no more relation to attempt than to any other title in the law. But it is not deemed to be within the province of an author to change the names of crimes; therefore, though the arrangement thus suggested would be intrinsically best, we shall consider, in this chapter, whatever is ordinarily set down in our books as pertaining to the offence of conspiracy.

§ 170. **How the Chapter divided.** — The order will be, I. The General Doctrine; II. The Element of the Law of Corrupt Combinations; III. The Element of the Law of Attempt; IV. Applications of the Elementary Doctrines to Particular Relations and Things; V. Statutory Conspiracies; VI. Remaining and Connected Questions.

[1] For matter relating to this title, see Vol. I. § 432, 592, 593, 767, 768, 792, 801, 814, 974. For the pleading, practice, and evidence, see Crim. Proced. II. § 202 et seq. And see Stat. Crimes, § 260 568, 625, 688.

I. *The General Doctrine.*

§ 171. **How defined.** — Conspiracy is the corrupt agreeing together of two or more persons to do, by concerted action, something unlawful, either as a means or an end.

§ 172. **Definition Explained.** — By "corrupt," in this definition, is meant an evil purpose, but not necessarily an intent to do what, if accomplished by one alone, would be indictable. A like signification is here attached to "unlawful;" many things are unlawful which are not indictable, and a combination of wills to do what would not be indictable if actually executed by one, constitutes in many circumstances an indictable conspiracy. Again, a conspiracy is a mere "agreeing together," — not necessarily otherwise an act.

§ 173. **Two Elements.** — If we examine these propositions more closely, we shall see that the law of conspiracy has two elements; one of *combination*, and the other of *attempt*.

Combination. — In many circumstances, if two or more combine to do a wrong, — whether the wrong be a means to something else, or the contemplated end, — the act of combining more endangers or disturbs the repose of the community than would the executed wrong performed by a single will. This is the central idea in the law of conspiracy.

Attempt. — In other circumstances, there is no such special evil in the combination, and its indictable quality does not consist in this linking together of wills for wrong. The thing contemplated to be done must, in these circumstances, be such as would be indictable if performed by one, and then the conspiracy is punishable simply because it is an attempt.

§ 174. **Old Statutory Definition.** — An old English statute, 33 Edw. 1, stat. 2, sometimes cited as 21 Edw. 1, undertook a definition as follows: "Conspirators be they that do confeder or bind themselves by oath, covenant, or other alliance, that every of them shall aid and bear the other falsely and maliciously to indict, or cause to indict, or falsely to move or maintain pleas; and also such as cause children within age to appeal men of felony, whereby they are imprisoned and sore grieved; and such as retain men in the country with liveries or fees for to maintain their malicious

enterprises [and to drown the truth[1]]; and this extendeth as well to the takers as to the givers. And stewards and bailiffs of great lords, which by their seigniory, office, or power, undertake to bear or maintain quarrels, pleas, or debates that concern other parties than such as touch the estate of their lords or themselves. This ordinance and final definition of conspirators was made and accorded by the king and his counsel in his Parliament, the thirty-third year of his reign." Here are no negative words; consequently, on principles elsewhere developed,[2] this statute does not abrogate any thing of the prior common law; but, since it professes merely to add a new provision, or to affirm an old one, it leaves whatever was before indictable as conspiracy, indictable still.[3] It is unequivocally of a date sufficiently early to be common law in this country,[4] though it has little or no practical effect anywhere.

§ 175. **Other Definitions.** — Conspiracy, in the modern law, is generally defined as a confederacy of two or more persons to accomplish some unlawful purpose, or a lawful purpose by some unlawful means.[5] The English commissioners, in their report of

[1] These five words, set here in brackets, are not in Hawkins; neither are they in the collections of the statutes by Pulton, by Ruffhead, and by Pickering, the latter two of whom followed Pulton; but they appear in the translation as revised by the commissioners of Geo. III., and published by authority. They appear also in Tomlins & Raithby's edition of the Statutes at Large, and 1 Williams Dig. p. 109.

[2] Stat. Crimes, § 151–153 et seq., 173.

[3] The State *v.* Buchanan, 5 Har. & J. 317; The State *v.* Norton, 3 Zab. 33, 40, 42. And see, as illustrative, Sydenham *v.* Keilaway, Cro. Jac. 7, pl. 9.

[4] Kilty mentions it among the statutes not found applicable in Maryland. Kilty Report of Statutes, 26. But the Pennsylvania judges say: "That part only of this statute is in force which relates to 'conspirators,' and from that part is to be excepted what relates to 'stewards and bailiffs and great lords.'" Report of Judges, 3 Binn. 595, 608.

[5] 1. Commonwealth *v.* Hunt, 4 Met. 111; The State *v.* Burnham, 15 N. H. 396; Commonwealth *v.* Judd, 2 Mass. 329, 337; Commonwealth *v.* Tibbetts, 2 Mass. 536, 538; People *v.* Mather, 4 Wend. 229; The State *v.* Cawood, 2 Stew. 360; Collins *v.* Commonwealth, 3 S. & R. 220; Morgan *v.* Bliss, 2 Mass. 111, 112; The State *v.* Rowley, 12 Conn. 101; O'Connell *v.* Reg., 11 Cl. & F. 155 9 Jur. 25; 1 Gab. Crim. Law, 243; 2 Russ. Crimes, 3d Eng. ed. 674; Alderman *v.* People, 4 Mich. 414; The State *v.* Mayberry, 48 Maine, 218; Reg. *v.* Bunn, 12 Cox C. C. 316, 338, 339, 4 Eng. Rep. 564.

2. **Definition expanded.** — In The State *v.* Buchanan, 5 Har. & J. 317, this subject of conspiracy was largely discussed; and the results to which the court arrived have been condensed by the New York criminal code commissioners as follows: In this case it is said, "that, by a course of decisions running through a space of more than four hundred years, from the reign of Edward III. to the 59 Geo. III., without a single conflicting adjudication, these points are clearly settled, — That a con-

1843, proposed the following: "The crime of conspiracy consists in an agreement of two persons (not being husband and wife), or more than two persons, to commit a crime, or fraudulently or maliciously to injure or prejudice the public or any individual person."[1] And in 1848 they proposed an abridged form of the definition; thus, "The crime [&c. as before] to defraud or injure the public or any individual person."[2] The definition given by the writer of these volumes, in the opening section of this sub-

spiracy to do any act that is criminal *per se* is an indictable offence at common law. That an indictment will lie at common law: 1. For a conspiracy to do an act not illegal, nor punishable if done by an individual, but immoral only. 2. For a conspiracy to do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public; for example, a combination by workmen to raise their wages. 3. For a conspiracy to extort money from another, or to injure his reputation, by means not indictable if practised by an individual; as, by verbal defamation, and that whether it be to charge him with an indictable offence or not. 4. For a conspiracy to cheat and defraud a third person, accomplished by means of an act which would not in law amount to an indictable cheat if effected by an individual. 5. For a malicious conspiracy to impoverish or ruin a third person in his trade or profession. 6. For a conspiracy to defraud a third person by means of an act *not per se* unlawful, and though no person be thereby injured. 7. For a bare conspiracy to cheat or defraud a third person, though the means of effecting it could not be determined on at the time." Draft of Penal Code, 76, 77.

3. **Another Exposition.** — In a much considered Massachusetts case, Shaw, C.J., in delivering the opinion of the court, observed: "Although the common law in regard to conspiracy in this Commonwealth is in force, yet it will not necessarily follow that every indictment at common law for this offence is a precedent for a similar indictment in this State. The general rule of the common law is, that it is a criminal and indictable offence for two or more to confederate and combine together, by concerted means, to do that which is unlawful or criminal, to the injury of the public, or portions or classes of the community, or even to the rights of an individual. This rule of law may be equally in force as a rule of the common law in England and in this Commonwealth; and yet it may depend upon the local laws of each country to determine, whether the purpose to be accomplished by the combination, or the concerted means of accomplishing it, be unlawful or criminal in the respective countries. . . . This consideration will do something towards reconciling the English and American cases, and may indicate how far the principles of the English cases will apply in this Commonwealth, and show why a conviction in England, in many cases, would not be a precedent for a like conviction here. Rex *v.* Journeyman Tailors, 8 Mod. 10, for instance, is commonly cited as an authority for an indictment at common law, and a conviction, of journeymen mechanics of a conspiracy to raise their wages. It was there held that the indictment need not conclude *contra formam statuti*, because the gist of the offence was the conspiracy, which was an offence at common law. It was therefore a conspiracy to violate a general statute law, made for the regulation of a large branch of trade, affecting the comfort and interest of the public; and thus the object to be accomplished by the conspiracy was unlawful, if not criminal." Commonwealth *v.* Hunt, supra, p. 121, 122.

[1] 7th Rep. Crim. Law Com. 1843, p. 275; Act of Crimes and Punishments, pub. 1844, p. 209.

[2] 4th Rep. of Com. of 1845, A. D. 1848, p. 65.

title, does not differ materially from these several definitions, but it is believed to be more clear and exact.

§ 176. **Offence at Common Law.** — That conspiracy is an offence at the common law, quite independently of Stat. Edw. 1, is a doctrine sufficiently established.[1]

Developed by Degrees. — But it is of a nature to be only gradually elucidated by adjudication; therefore, though the facts of some cases, and their subordinate principles, may seem new, yet truly they present but new manifestations of the old law, the expansion whereof is apparent, not real.[2] Lord Coke mentions in his Institutes only one kind of conspiracy; namely, "to appeal or indict an innocent, falsely and maliciously, of felony;"[3] but we should greatly err if we supposed no other conspiracy cognizable by the criminal law at the time he wrote.[4]

§ 177. **In United States.** — The common law on this subject came with our forefathers to this country;[5] yet, again, in its application to our different institutions and relations, it sometimes sustains an indictment here which it would not in England, or refuses its support to one here which it would uphold there. In other words, the common law of conspiracy is the same in the two countries, but its applications vary with their circumstances, statutes, and general jurisprudence.[6]

§ 178. **Distinction whether Means or Object unlawful.** — There is a distinction sometimes made between a conspiracy to accomplish an unlawful object by lawful means, and one to accomplish a lawful object by means unlawful.[7] This distinction is possibly, in some circumstances, important as respects the mere form of the indictment;[8] but, as to the offence itself, there is no differ-

[1] Tindal, C. J., in O'Connell *v.* Reg., 11 Cl. & F. 155, 233; The State *v.* Buchanan, 5 Har. & J. 317, 333, 351.

[2] See Vol. I. § 18–20.

[3] 3 Inst. 143.

[4] Therefore the first sentence in the following from a learned judge, in The State *v.* Younger, 1 Dev. 357, is hardly correct in form, though the whole passage is substantially right: "Conspiracy was anciently confined to imposing by combination a false crime upon any person, or conspiring to convict an innocent person by perjury and a perversion of the law. But it is certain, that modern cases have extended the doctrine far beyond the old rule of law; and it has long been established, that every conspiracy to injure individuals, or to do acts which are unlawful, or prejudicial to the community, is a conspiracy, and indictable." And see Mifflin *v.* Commonwealth, 5 Watts & S. 461.

[5] The State *v.* Burnham, 15 N. H. 396.

[6] And see the observations of Shaw, C. J., in Commonwealth *v.* Hunt, 4 Met. 111, 121; ante, § 175, note, par. 3.

[7] See cases cited ante, § 175.

[8] Commonwealth *v.* Shedd, 7 Cush. 514; Commonwealth *v.* Eastman, 1 Cush 189, 224; The State *v.* Burnham, 15 N. H

ence to be noted whether the unlawful thing be means or end. If both means and end are unlawful, *a fortiori*, the offence is constituted. If neither is unlawful, there is no offence.

Meaning of "Unlawful." — The reader should bear in mind, that "unlawful" signifies contrary to law, and many things are contrary to law while not subjecting the doer to a criminal prosecution. Therefore, in the language of Cockburn, C. J., "it is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which, if done, would be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful; that is, amount to a civil wrong."[1] This doctrine is mentioned in other connections in this chapter;[2] but, though nothing contrary to it is actually held by our courts, it is so often overlooked by American judges, and such confusion comes in consequence, that a little repetition of the proposition is necessary.

§ 179. **Two Elements — (Unlawful Combination — Attempt).** — Hence we have the doctrine of two elements in the law of conspiracy, already stated.[3] Out of these, and their combination with the general principles of criminal jurisprudence presented in the first volume, whatever pertains to this subject of conspiracy proceeds. Continuing, then, in the order already indicated, let us now look more minutely into the two elements.

II. *The Element of the Law of Corrupt Combinations.*

§ 180. **General Doctrine.** — There are many circumstances in which combinations of persons, for the promotion of evil, portend a danger, and call for legal interposition, when the single efforts of individuals might pass unnoticed by the law, which does not take cognizance of all wrongs.[4] Therefore, in the language of the English criminal-law commissioners, "the general principle on which the crime of conspiracy is founded is this, that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint; although none would be necessary

896; People *v.* Richards, 1 Mich. 216; March *v.* People, 7 Barb. 391; The State *v.* Bartlett, 30 Maine, 132.

[1] Reg. *v.* Warburton, Law Rep. 1 C. C. 274, 276.

[2] Ante, § 172, 175, note; post, § 181 et seq., 198, 215 et seq., 235, note.

[3] Ante, § 173.

[4] Vol. I. § 10, 11, 16, 592.

were the same thing proposed, or even attempted to be done, by any person singly."[1]

Illustrations — (Maintenance — Riots — Indictable Trespass to Property, &c.). — The offences of maintenance,[2] of unlawful assemblies,[3] of riots, routs, and some others partake more or less of this element. In like manner, congregated numbers sometimes supply in law the place of actual violence; as, where three persons, committing a trespass upon property in the presence of its possessor, without force, were held indictable therefor, while one alone would not have been so unless he had used force.[4]

§ 181. **Wrong Contemplated need not be Indictable.** — Hence it follows, as already said,[5] that, in conspiracy, the unlawful thing proposed, whether as a means or an end, need not be such as would be indictable if proposed or even done by a single individual.[6]

Limits of the Rule. — But this rule, like all others in the law, cannot be extended beyond the reason on which it rests. Therefore, where the thing to be done by the conspirators is such as is not indictable when performed by one, it must, to constitute the basis of an indictable conspiracy, be of a nature to be particularly harmful by reason of the combination, or else the case must be one in which there is a particular power in combining. Not all wrongful things are of such a nature.

§ 182. **Illustrations — (Defraud — Trespass on Real Estate).** — Thus there are many ways in which several persons, acting together, may defraud a third person of his property; while the individual attempt of each, with the fraudulent purpose, would have failed. Severally, they stand on equal footing with him; collectively, they occupy toward him unfair ground.[7] On this principle, a conspiracy to cheat, though unexecuted, is indictable, even where the unassociated attempt of the several conspirators

[1] 7th Rep. Crim. Law Com. 1843, p. 90; Act of Crimes and Punishments, pub. 1844, p. 209. See observations of Parsons, C. J., in Commonwealth *v.* Judd, 2 Mass. 329, 337. And see observations in Twitchell *v.* Commonwealth, 9 Barr, 211, 212, and The State *v.* Burnham, 15 N. H. 396.

[2] Ante, § 129, 130.

[3] Stebbins, Senator, in Lambert *v.* People, 9 Cow. 578, 600.

[4] The State *v.* Simpson, 1 Dev. 504.

[5] Ante, § 172, 175, note, 178.

[6] Vol. I. § 592; The State *v.* Rowley, 12 Conn. 101; The State *v.* Burnham, 15 N. H. 396; People *v.* Richards, 1 Mich. 216; Reg. *v.* Carlisle, Dears. 337; 25 Eng. L. & Eq. 577, 23 Law J. N. S. M. C. 109, 18 Jur. 386; Reg. *v.* Warburton, Law Rep. 1 C. C. 274.

[7] Vol. I. § 232, 250–252; ante, § 171.

would not be so, though successfully executed.[1] But if the object of the conspiracy is to commit a mere civil trespass on real estate, it is not criminal, because such an act by one person is not criminal, and many united have in this instance, differing in nature from the other, no more power for harm, and do no more harm, than if each proceeded with his part of the mischief alone.[2]

§ 183. **Trespass on Real Estate, continued.** — The leading case sustaining the point last mentioned is Rex *v.* Turner,[3] now generally understood to have been decided incorrectly, but on other points. The object of the conspirators, as stated in the indictment, was to kill and take hares from a preserve, which, by Stat. 13 Geo. 3, c. 80, § 1, was an offence subject to a penalty of not more than £20, nor less than £10; and, in doing this, to go armed with weapons for resisting all attempts to obstruct or apprehend them. The minds of the judges did not advert to these points in the case, either one of which, it is by lawyers believed, would have led to the sustaining of the prosecution; because a conspiracy to commit a crime is, as a general proposition, indictable; and because a combination to use physical force, by persons acting therein jointly, is of a nature to give the conspirators a power for evil which they would not singly possess.[4]

Combinations of Physical Force. — Yet in respect to the latter of these two reasons, we have seen, that the law always deems the employment of physical force toward an individual to be an assumption of unfair ground;[5] and so the inference appears inevitable, that no combination of physical force can be indictable, under circumstances in which its use by one would not be so, if its tendency is simply to injure a private person. If it leads to a

[1] Vol. I. § 592; post, § 198.

[2] Rex *v.* Turner, 13 East, 228. The judge did not mention, in this case, the same *reason* which is stated in our text, — an omission not very material to notice. In our next section will be seen another reason for the conclusion of the court, which reason is probably equally sound with the one in this section. See, also, The State *v.* Straw, 42 N. H. 393, 397.

[3] Rex *v.* Turner, 13 East, 228.

[4] Reg. *v.* Rowlands, 2 Den. C. C. 364, 388, 9 Eng. L. & Eq. 287, 292, 17 Q. B. 671; 3 Greenl. Ev. 3d ed. 90 *a*, note; 1 Gab. Crim. Law, 251 and note; 1 Deac. Crim. Law, 278; Report of the Penal Code of Mass. 1844, tit. Conspiracy, p. 5, note; 7th Report Eng. Crim. Law Com. 1843, p. 90; Act of Crimes and Punishments, 1844, p. 209. Gibson, C. J., says, the case of Rex *v.* Turner is, "to say the least of it, an odd case." Mifflin *v.* Commonwealth, 5 Watts & S. 461.

[5] Vol. I. § 548, 556–558, 574 et seq.

public disturbance, as to a riot, it then falls under a different consideration.

§ 184. **Where Combination is itself a Part of the Wrong.** — Another illustration of the proposition, that there are wrongs not of a nature to be aggravated by combination, therefore that conspiracies to commit them are not indictable where the doing of them by one is not, may be seen in cases wherein the combination is a necessary part of the wrong itself. Thus, —

Adultery. — An act of adultery implies the consent of the two persons; and, if a man and woman should agree to commit it with each other, the conspiracy clearly would not be indictable, in those localities where the act itself would not be. We have seen,[1] that doubtless such a corrupt combination would be a criminal attempt, — one of the elements of conspiracy, — in localities where adultery is a very heavy crime; but, in Pennsylvania, where it is a light one, a conspiring by two to commit it with each other was held not to be punishable.[2]

§ 185. **Executed by Combination.** — Perhaps the proposition may be maintained on authority, certainly it may on principle, that, for a conspiracy to be indictable by reason of the evil which lies in the combining, — not speaking now of conspiracies in the nature of attempts, — the confederation must embrace, in its purpose, the exercise of the combined powers of the conspirators, or of more than one of them, for the accomplishment of the contemplated wrong. If two should agree that one alone should, by unindictable means, do an unindictable wrong to a third person, this would present only the common case of one man undertaking the wrong and another rendering to it the concurrence of his will; here, since neither the act is indictable, nor the intent, the combining cannot be. The combination has in it no element of power, other than would lie in the intent, or attempt, of the one unaided. But if the two were proposing to proceed together, in a case where there is force in the mere combination; or to proceed singly, each doing his particular part, where there

[1] Vol. I. § 768.

[2] Shannon *v.* Commonwealth, 2 Harris, Pa. 226. The propcsition in this case, that a conspiracy to commit a criminal act whereof consent is an element cannot be indictable, is not good; because it would overturn the whole doctrine of attempt. An attempt is almost always a step in a substantive crime. See Vol. I. § 723 et seq. Still such a conspiracy was adjudged not punishable in Alabama Miles *v.* The State, 58 Ala 390.

is force in their severally acting to one end; there, the necessary other circumstances concurring, the conspiracy would be indictable; though no one thing proposed to be done would be so, if even it were actually accomplished by one of the conspirators alone.

Cheats. — This proposition does not conflict with what is held by the courts;[1] namely, that the mere combining by individuals to defraud another, without any concert respecting the means, is punishable as conspiracy; because, in such a case, the combination itself implies a union of corrupt power adapted alone to accomplish the object.

§ 186. **Too Small to Notice, &c.** — It clearly follows from established principles, that there may be circumstances in which the combination will have a special power for harm, when, still, the conspiracy will not be punishable because of its being too small a thing,[2] viewed in the light of its general consequences, for the law to notice;[3] or because of other opposing rules of the law such as were brought to view in the first volume.

§ 187. **How many Conspirators.** — From this view it results, that a conspiracy cannot be committed by one person alone.[4]

Husband and Wife. — Neither can it be by a husband and his wife alone, they being regarded legally as one.[5] But a wife may be joined with her husband in an indictment for this offence, if there is also another conspirator.[6] In like manner, the husband and his wife may be prosecuted together, alone, for a conspiracy entered into before their marriage.[7]

§ 188. **How many, as to the Procedure.** — When two conspirators are charged jointly, no third person being mentioned in the indictment as a co-conspirator, known or unknown, and one of them is acquitted, his acquittal operates as an acquittal of the other.[8] Yet one may be convicted after the other is dead;[9] and,

[1] Post, § 198 et seq.

[2] See observations of Lord Denman, C. J., in Reg. *v.* Kenrick, 5 Q. B. 49, 62, Dav. & M. 208.

[3] Vol. I. § 212 et seq.

[4] Commonwealth *v.* Manson, 2 Ashm. 31; Rex *v.* Hilbers, 2 Chit. 163; United States *v.* Cole, 5 McLean, 513.

[5] 1 Hawk. P. C. Curw. ed. p. 448, § 8.

[6] Rex *v.* Hodgson, A. D. 1831, before Lord Tenterden, see Gurney's report of this case; Commonwealth *v.* Woods, 7 Law Reporter, 58; Rex *v.* Locker, 5 Esp. 107; Archb. New Crim. Proced. 7. And see Reg. *v.* Gompertz, 9 Q. B. 824; The State *v.* Covington, 4 Ala. 603.

[7] Rex *v.* Robinson, 1 Leach, 4th ed. 37.

[8] The State *v.* Tom, 2 Dev. 569; 3 Chit. Crim. Law, 1141. The same of a *nol. pros.*, which operates as an acquittal. The State *v.* Jackson, 7 S. C. 283.

[9] Rex *v.* Nicolls, 2 Stra. 1227; Reg. *v* Kenrick, 5 Q. B. 49, Dav. & M. 208.

where there were three, and one died before the trial, and another was acquitted, the third was held liable still.[1] And there is no necessity for all to be either indicted or tried together; but, if, after the conviction of one, whether he was proceeded against alone or with others, there appears on the whole record a sufficient allegation against him and another who has not been actually acquitted, his conviction is good.[2]

§ 189. **Two — More — (Riot — Labor Combinations).** — Therefore the law requires two, and is indifferent whether there be more, in every conspiracy.[3] But obviously there are circumstances in which an evil combination, to be efficacious, must consist of more than two. Thus, it is legally necessary for three, at least, to combine, to commit a riot.[4] In conspiracy, however, no rule of law requires more than two; the law has not descended to so nice a refinement; yet there are evidently circumstances in which two persons alone would hardly be held as conspirators, while many together would be. For example, combinations of laborers to raise the price of wages,[5] and other like combinations, derive their force from numbers; and we cannot presume the courts would decide that two alone can commit such an offence under every variety of circumstances in which it may be committed by many.

§ 190. **What Union of Wills.** — Another proposition, hardly requiring specific mention, is, that there must be, between the conspirators, concert of will and endeavor, as distinguished from a mere several attempt, without such concert, to accomplish the particular wrong.[6] Yet there is no need, in conspiracy more than in other crimes, that the defendant should have been an original contriver of the mischief: for he may become a partaker in it by joining the others while it is being executed. If he actually concurs, no proof is requisite of an agreement to concur.[7] And if

[1] People *v.* Olcott, 2 Johns. Cas. 301.

[2] Rex *v.* Cooke, 7 D. & R. 673, 5 B. & C. 538; 3 Chit. Crim. Law, 1141 And see Reg. *v.* Ahearne, 6 Cox C. C. 6.

[3] Commonwealth *v.* Irwin, 8 Philad. 380.

[4] Vol. I. § 534.

[5] See observations of Shaw, C. J., in Commonwealth *v.* Hunt, 4 Met. 111, 131, ante, § 175, note, par. 3; and of Savage, C. J., in People *v.* Fisher, 14 Wend. 9, 19. And see post, § 230 et seq.

[6] Rex *v.* Pywell, 1 Stark. 402; Reg. *v.* Kenrick, 5 Q. B. 49, 62, Dav. & M. 208; Rex *v.* Hilbers, 2 Chit. 163; Commonwealth *v.* Ridgway, 2 Ashm. 247.

[7] People *v.* Mather, 4 Wend. 229, 259; Reg. *v.* Murphy, 8 Car. & P. 297; Stewart *v.* Johnson, 3 Harrison, 87; Vol. I. § 642, 649, 650. *A fortiori*, there is no need the conspirators should have had any previous acquaintance with each other. Lord Mansfield, in the case of the prisoners in the King's Bench, Hilary T. 26 Geo.

persons meet for a lawful purpose, then proceed to act together unlawfully, the transaction thus becomes an unlawful conspiracy.[1] As soon as the union of wills for the unlawful purpose is perfected, the offence of conspiracy is complete, — no act beyond this is required.[2]

Evidence. — The joint assent of minds, like all other parts of a criminal case, may be established as an inference of the jury from other facts proved; in other words, by circumstantial evidence.[3]

III. *The Element of the Law of Attempt.*

§ 191. **In General.** — We have already seen, in a general way, that conspiracy is, to a certain extent, a species of attempt.[4]

§ 192. **Overt Act.** — Therefore in conspiracy the thing intended need not be accomplished; but the bare combination constitutes the crime.[5] No overt acts need be alleged or proved.[6] In New York,[7] New Jersey,[8] and perhaps some other of the States, statutes have made it necessary, in most cases, for some overt act to be performed, in pursuance of the combination; yet, even in these States, the object of the conspiracy need not be fully accomplished.[9] So, in these States, if one alone of the conspirators performs the required overt act, in pursuance of the conspiracy, it is sufficient against all.[10]

§ 193. — **Overt Act as to Procedure.** — At the common law, the same as under this statute, the indictment frequently mentions things done in carrying out the conspiracy;[11] but, at the common

3, 1 Hawk. P. C. 6th ed. c. 72, § 2, note 2.

[1] Lowery *v.* The State, 30 Texas, 402.

[2] Heymann *v.* Reg., Law Rep. 8 Q. B. 102, 105, 12 Cox C. C. 383; post, § 192.

[3] 3 Chit. Crim. Law, 1141, 1143; 3 Greenl. Ev. § 93; Reg. *v.* Murphy, 8 Car. & P. 297; Rex *v.* Parsons, 1 W. Bl. 392; Rex *v.* Cope, 1 Stra. 144; The State *v.* Sterling, 34 Iowa, 443.

[4] Vol. I. § 767; ante, § 173, 179.

[5] Vol. I. § 432; ante, § 190; Poulterer's Case, 9 Co. 55 *b*, 56 *b*, 57 *a*; Reg. *v.* Best, 1 Salk. 174, 2 Ld. Raym. 1167, 6 Mod. 137, 185, 186; Rex *v.* Kinnersley, 1 Stra. 193; Rex *v.* Rispal, 3 Bur. 1320, 1321; Landringham *v.* The State, 49 Ind. 186; Isaacs *v.* The State, 48 Missis. 234; Commonwealth *v.* Judd, 2 Mass 329, 337; The State *v.* Buchanan, 5 Har. & J. 317, 349, 352; Hazen *v.* Commonwealth, 11 Harris, Pa. 355. See Rex *v.* Spragg, 2 Bur. 993, 999.

[6] The State *v.* Straw, 42 N. H. 393; The State *v.* Pulle, 12 Minn. 164.

[7] Vol. I. § 432.

[8] The State *v.* Norton, 3 Zab. 33.

[9] People *v.* Chase, 16 Barb. 495; The State *v.* Norton, 3 Zab. 33.

[10] Collins *v.* Commonwealth, 3 S. & R. 220; United States *v.* Donau, 11 Blatch. 168; Vol. I. § 628 et seq., 686.

[11] See 1 Stark. Crim. Pl. 2d ed. 155, Am. ed. of 1824, p. 170; 1 Ben. & H Lead. Cas. 296.

law, they need not be proved;[1] or if, on this point, the proof varies from the allegation, it will do;[2] and indeed the allegation of overt acts, in respect of the common-law conspiracy, is quite unnecessary.[3] If such allegation is informal or uncertain, no harm comes from the defect.[4]

§ 194. **Principle of Attempt, explained.** — But the foregoing view shows us only how the doctrine of attempt pervades the law of conspiracy in common with other departments of the criminal law. When, however, we seek for the special manifestation of the doctrine of attempt in conspiracy, we find it to be, that the combining of two or more wills to do a particular criminal thing is an attempt to do this thing, on which ground it is indictable.[5] And most unphilosophically, as already mentioned,[6] have our books of the law treated of this species of attempt under the title of conspiracy.

§ 195. **Continued.** — And the reader should bear in mind, that the cases in which something of evil, or of power to do evil, comes from the combination of wills, as already considered,[7] are the only ones illustrating the distinctive doctrine of conspiracy; while, where the combination gives no additional power, it is still an attempt, punishable in proper circumstances under the name of conspiracy. In these latter circumstances, the wrong intended must be such as would be indictable if actually performed by a single individual; and, when it is such, the conspiracy is generally punishable.[8]

Small in Magnitude. — The exception is, that, as the doctrine of attempt discussed in the preceding volume teaches, if the thing intended is but just sufficient in magnitude of evil for the criminal law to notice it, the attempt to perpetrate it by a conspiracy is therefore too small a dereliction from duty to be regarded.[9] Thus, —

[1] Commonwealth *v.* Eastman, 1 Cush. 189; The State *v.* Noyes, 25 Vt. 415; Commonwealth *v.* Davis, 9 Mass. 415.

[2] Contra, 3 Greenl. Ev. § 95.

[3] Reg. *v.* Turvey, Holt, 364; The State *v.* Bartlett, 30 Maine, 132; Commonwealth *v.* Eastman, 1 Cush. 189; The State *v.* Noyes, 25 Vt. 415; Sydserff *v.* Reg., 11 Q. B. 245, 12 Jur. 418; Reg. *v.* Gompertz, 9 Q. B. 824; Reg. *v.* Kenrick, 5 Q. B. 49, Dav. & M. 208.

[4] Commonwealth *v.* Davis, 9 Mass. 415; Commonwealth *v.* Tibbetts, 2 Mass. 536.

[5] Vol. I. § 767.

[6] Ante, § 169, 173.

[7] Ante, § 180 et seq.

[8] The State *v.* Buchanan, 5 Har. & J. 317, 335, 351; 3 Greenl. Ev. § 90.

[9] Vol. I. § 760, 767, 768; Reg. *v.* Kenrick, 5 Q. B. 49, 62, Dav. & M. 208.

Usury. — In an old case, a corrupt agreement concerning the taking of usury was held not to be indictable, though the act would have been so if the agreement had been carried into effect.[1]

IV. *Application of the Elementary Doctrines to Particular Relations and Things.*

§ 196. **Variable.** — In some respects, the foregoing doctrines are of easy and exact application. But, in other respects, and in some classes of cases, their application is difficult, or they leave in the court a wide discretion, to hold a particular conspiracy indictable or not. It is the purpose of the present sub-title, not to seek much for further principles, but to see how these have been applied by the courts.

§ 197. **How the Sub-title divided.** — Some classification will be convenient; therefore, without aiming at any scientific arrangement, we shall examine the cases under the following heads: First, Conspiracies to defraud individuals; Secondly, To injure individuals otherwise than by fraud; Thirdly, To disturb the course of government and of justice; Fourthly, To create public breaches of the peace; Fifthly, To create public nuisances, and do other like injuries; Sixthly, Conspiracies concerning wages and the like; Seventhly, Conspiracies against both individuals and the community. These heads are not intended to include all possible cases to which the law of conspiracy may hereafter be applied, though doubtless they do most. And perhaps some of the cases adjudged in the past are not strictly within any of these heads; the classification, indeed, is merely for convenience, where the subject does not admit of distinct lines. Many of the decisions might claim consideration under more than one head, as presenting various aspects of combined wrong.

§ 198. First. *Conspiracies to defraud Individuals:* —

Indictable Frauds. — When the fraud intended by the conspirators is such, that, if actually done by one, he would be answerable criminally therefor, the conspiracy is likewise, for the reasons before mentioned,[2] indictable as an attempt.[3] What is such a

[1] Rex *v.* Upton, 2 Stra. 816.

[2] Ante, § 195.

[3] The State *v.* Norton, 3 Zab. 33; The State *v.* Buchanan, 5 Har. & J. 317, 351; Clary *v.* Commonwealth, 4 Barr, 210; Collins *v.* Commonwealth, 3 S. & R. 220;

conspiracy, we need not here inquire; because we have already seen what cheats by one are crimes at the common law, and the law of false pretences under statutes will be examined further on.[1]

Frauds not indictable. — But the doctrine is also established, that, for many other cheats and frauds when attempted or done by means of conspiracies, there may be prosecutions by indictment, wherein the parties are to be punished for agreeing together to do what would have rendered no one of them liable, if singly he had done, by the same means, the thing agreed.[2] There is a New Jersey case,[3] in which this last proposition was controverted by a strong *dictum*, but it did not settle the law, even for that State;[4] and throughout the Union elsewhere, and in England, the law is as just expressed; or, at least, the proposition is seldom or never denied. At the same time, the discussions in the author's work on Criminal Procedure, concerning the form of the indictment for conspiracies to defraud individuals, show, that, in point of fact, still other judges have appeared to assume, without reflection, the law to be as maintained by the one New Jersey judge.[5]

§ 199. **As to Allegation of Means.** — But a diversity of opinion seems to have arisen upon the question, whether, if two or more persons agree to cheat or defraud another of lands or goods,

Hartmann *v.* Commonwealth, 5 Barr, 60; Reg. *v.* Parker, 3 Q. B. 292, 2 Gale & D. 709; Wright *v.* Reg., 14 Q. B. 148; Reg. *v.* Whitehouse, 6 Cox C. C. 38; Reg. *v.* Hudson, Bell C. C. 263, 8 Cox C. C. 305; Reg. *v.* Timothy, 1 Fost. & F. 39; Heymann *v.* Reg., 8 Q. B. 102, 12 Cox C. C. 383. See, and query, Reg. *v.* Levine, 10 Cox C. C. 374.

[1] Ante, CHEATS; post, FALSE PRETENCES.

[2] The State *v.* Buchanan, 5 Har. & J. 317; Sydserff *v.* Reg., 11 Q. B. 245, 12 Jur. 418; People *v.* Richards, 1 Mich. 216; Commonwealth *v.* Ridgway, 2 Ashm. 247; Reg. *v.* Gompertz, 9 Q. B. 824, 16 Law J. N. S. Q. B. 121; Twitchell *v.* Commonwealth, 9 Barr, 211; Reg. *v.* Kenrick, 5 Q. B. 49, Dav. & M. 208; The State *v.* Shooter, 8 Rich. 72; The State *v.* Burnham, 15 N. H. 396; Commonwealth *v* Warren, 6 Mass. 74; Commonwealth *v.* Ward, 1 Mass. 473; Patten *v.* Gurney, 17 Mass. 182, 184; Bean *v.* Bean, 12 Mass. 20, 21; Rhoads *v.* Commonwealth, 3 Harris, Pa. 272; Rex *v* Macarty, 2 East P. C. 823, 824, 6 Mod. 301; s. c. nom. Rex *v.* Mackarty, 2 Ld. Raym. 1179; Reg. *v.* Orbell, 6 Mod. 42; Reg. *v.* Button, 11 Q. B. 929; The State *v.* Simons, 4 Strob. 266; The State *v.* De Witt, 2 Hill, S. C. 283; The State *v.* Younger, 1 Dev. 357; Lambert *v.* People, 7 Cow. 166, 9 Cow. 578; Levi *v.* Levi, 6 Car. & P. 239; Reg. *v.* Wilson, 8 Car. & P. 111; Morris Run Coal Co. *v.* Barclay Coal Co., 18 Smith, Pa. 173.

[3] The State *v.* Rickey, 4 Halst. 293, 300.

[4] The State *v.* Norton, 3 Zab. 33, 44.

[5] Crim. Proced. II. § 214 et seq. In People *v.* Brady, 56 N. Y. 182, 189, 190, there is a dictum which seems to be in a measure contrary to my text; but, if so, I still think the learned judge mistaken.

without agreeing upon the particular means to be employed, the conspiracy is then indictable; or whether they must go further, and determine the means, when it will be indictable or not, according to the nature of the means. The question, indeed, as usually presented in the reports, wears the aspect of one concerning the mere form of the allegation in the indictment; but an accurate examination shows the difference to extend further.

§ 200. **English Form of Allegation.** — And the doctrine is now fully settled in England, not without some doubts having been entertained in the earlier stages of the inquiry, that the words, "unlawfully, fraudulently, and deceitfully did conspire, combine, confederate, and agree together *to cheat and defraud*" one "of his goods and chattels," contain a sufficient allegation of conspiracy, without mention of any means intended.[1]

§ 201. **American.** — The same has been held in Michigan;[2] rather indistinctly, also, in North Carolina.[3] And in New York the Supreme Court came to the same result, before the statutes which now regulate the question were there enacted;[4] but the case was overruled in the Court of Errors by the casting vote of its presiding officer, yet whether on this point or not there is an ambiguity.[5] In some of the other States, the question is perhaps not settled.[6] On the other hand, the courts of Massachusetts[7] and Maine[8] have held, that the means intended to be used must be set out. This question, however, is more exactly discussed,

[1] Sydserff *v.* Reg., 11 Q. B. 245, 12 Jur. 418; Reg. *v.* Gompertz, 9 Q. B. 824; Reg. *v.* King, Dav. & M. 741; Rex *v.* Gill, 2 B. & Ald. 204.

[2] People *v.* Richards, 1 Mich. 216.

[3] The State *v.* Younger, 1 Dev. 357. In this case, the allegation was, "did combine, conspire, confederate, and agree to and with each other, to cheat and defraud one P. D. out of his goods and chattels," and it was held sufficient. But, in fact, overt acts were also set out; and though (see ante, § 193) this could not help the other part of the indictment, if it were insufficient, yet the attention of the court was not directed to this point.

[4] See March *v.* People, 7 Barb. 391.

[5] Lambert *v.* People, 7 Cow. 166, 9 Cow. 578. In Scholtz's Case, 5 City Hall Recorder, 112, this form was held to be sufficient. And see People *v.* Olcott, 2 Day, 507, note 1, 2 Johns. Cas. 301.

[6] See, as perhaps indicating how the question stands in Pennsylvania, Clary *v.* Commonwealth, 4 Barr, 210; Hartmann *v.* Commonwealth, 5 Barr, 60; Collins *v.* Commonwealth, 3 S. & R. 220; Commonwealth *v.* McKisson, 8 S. & R. 420; Rhoads *v.* Commonwealth, 3 Harris, Pa. 272, 277; Commonwealth *v.* Ridgway, 2 Ashm. 247; Twitchell *v.* Commonwealth, 9 Barr, 211.

[7] Commonwealth *v.* Eastman, 1 Cush. 189; Commonwealth *v.* Wallace, 16 Gray, 221.

[8] The State *v.* Roberts, 34 Maine, 320

and on the later authorities, in the work on Criminal Procedure; to which the reader is referred.[1]

§ 202. **How the Allegation in Principle.** — It may seem strange, as a question of pleading, to hold parties for a great crime on so short an allegation as that, on a day named, they unlawfully confederated to cheat a person mentioned of his lands and goods. But though cheating, by one, is not always indictable, it is always unlawful;[2] and a conspiracy, say the books, to do an unlawful thing, even by lawful means, is a crime. If, therefore, there is deemed to be a defect in this short allegation, one cannot easily see how a mention of lawful means is to mend it. If the defect consists in not stating the end of the conspiracy, the conspiracy has no end but cheating, and this end is stated. Moreover, if the means proposed to be employed must be set out, it logically follows, that, when they do not consist of acts which would be indictable performed by one, they must be of a nature to derive their power for mischief from the combination of numbers: things which can be done as effectually by persons proceeding severally as in concert not being sufficient.[3] But if the reader will consult the cases referred to in our last section, he will see, that such a distinction has never been drawn by the judges. Even in the leading case,[4] in which the means were held to be a necessary part of the allegation, the court admitted, "that the purchase of goods by an insolvent person, knowing himself to be such, without any expectation of paying for the goods, would be an unlawful act, which might be the subject of a conspiracy," — an act, nevertheless, to be just as effectually performed by one person as by many, but not indictable unless done in combination. The true view probably is, that, referring to distinctions laid down in our first volume,[5] which the reader will consult, a combination of the mental forces of numbers, in a conspiracy, is, like the physical force of a single individual, indictable when directed against the property rights of others; this general proposition, like that concerning physical force, being subject to such limitations and qualifications as the other principles of the criminal law require.

§ 203. **Aggravations.** — Under the title Assault, we saw how

[1] Crim. Proced. II. § 204-222.
[2] See ante, § 178.
[3] See ante, § 185.
[4] Commonwealth *v.* Eastman, 1 Cush 189, 220, 221.
[5] Vol. I. § 546, 574, 575, 581.

that offence — as simple as conspiracy, and admitting of as brief a description in the indictment — may be aggravated by innumerable circumstances, and how it is customary to set forth in the indictment the aggravations of the particular case.[1] In like manner, a conspiracy to cheat is aggravated by the parties proceeding to devise the plans; and this aggravation is greater or less according to the nature of the plans. It may be further aggravated by their carrying or beginning to carry the contemplated wrong into execution; and here, again, the amount of the aggravation depends upon the amount and nature of what is done. And as in assault, so in conspiracy, the indictment usually sets out the matter aggravating the offence; yet the offence exists without this matter, and strictly it need not, as we have seen,[2] be stated in the indictment, though some authorities hold otherwise.

§ 204. **Illustrations.** — Some illustrations of aggravated conspiracies to defraud individuals are the following: —

Deceitful Wager — Why. — A comparatively old case holds it to be indictable when one, to defraud another, procures him to lay money on a foot-race, and then prevails on the party to run booty.[3] This result was evidently derived from the doctrine of conspiracy, though only one of the conspirators was proceeded against;[4] and it is a conspiracy in which the entire power for evil lies in the combination.[5] Indeed, the corrupt agreeing together, which is the gist of this offence, is placed, by the judges in some of the cases, on the same ground as the employment of a false token; "for," says Lord Mansfield, "ordinary care and caution are no guard against this."[6]

§ 205. **Bartering bad Liquor.** — In another of these older cases, the undertaking, which, indeed, was executed, was to barter for hats a quantity of unwholesome liquor, not fit to be drank, as "good and true new Portugal wine;" and, the better to effect this cheat, one of the conspirators pretended to be a broker and

[1] Ante, § 43.
[2] Ante, § 193.
[3] Reg. v. Orbell, 6 Mod. 42.
[4] See ante, § 187.
[5] See ante, § 180, 181.
[6] Rex v. Wheatly, 2 Bur. 1125, 1127, 1 Bennett & Heard Lead. Cas. 1, 3; The State v. Buchanan, 5 Har. & J. 317, 345; People v. Babcock, 7 Johns. 201; Cross v. Peters, 1 Greenl. 376; Commonwealth v. Warren, 6 Mass. 72; People v. Stone, 9 Wend. 182; People v. Miller, 14 Johns. 371; Rex v. Lara, 2 Leach, 4th ed. 647, 6 T. R. 565; The State v. Justice, 2 Dev 199.

the other a wine merchant. This case also, in which the parties were convicted, has been sometimes viewed as one of a mere ordinary cheat at the common law; but it really proceeded on the ground of conspiracy.[1]

§ 206. **Further Illustrations — (Drunk — Cards — False Bank-notes — False Representations at Sale — Mock Auction — Destroying Will — Getting Goods by Deceit — Secreting Property from Creditors — Fabricating Shares of Stock, &c.).** — So, to combine to cheat by making one drunk and playing at cards with him falsely;[2] or, by selling forged foreign bank-notes of a denomination prohibited by statute, even though the actual sale of them, by one, should not be within the laws against counterfeiting;[3] or, by falsely representing to a purchaser that a horse, offered for sale, is the property of a lady deceased, and not of a dealer in horses, and is quiet and tractable;[4] or, by making false statements to one of whom a horse has been bought on credit, concerning its soundness and the price for which the purchaser resold it, so as to get a remission of a part of the sum due for it;[5] or, by a mock auction, with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth;[6] or, by destroying a will under which persons have rights;[7] or, by obtaining, on credit, goods to come into the hands of one conspirator, and be attached by another for a fictitious claim;[8] or, by removing, secreting, or making conveyance of property for the purpose of keeping it from creditors, to defraud them of their dues;[9] or, by fabricating shares, in addition to the number limited, in a joint-stock company, even though there was an imperfection in the original formation of the company;[10] is, like many other

[1] Rex *v.* Macarty, 6 Mod. 301; s. c. nom. Rex *v.* Mackarty, 2 Ld. Raym. 1179, and particularly for a full and exact statement of it, 2 East P. C. 823.

[2] The State *v.* Younger, 1 Dev. 357.

[3] Twitchell *v.* Commonwealth, 9 Barr, 211.

[4] Reg. *v.* Kenrick, 5 Q. B. 49 Dav. & M. 208.

[5] Reg *v.* Carlisle, Dears. 337, 25 Eng. L. & Eq. 577, 23 Law J. N. S. M. C. 109, 18 Jur. 386.

[6] Reg. *v.* Lewis, 11 Cox C. C. 404.

[7] The State *v.* De Witt, 2 Hill, S. C 282.

[8] Reg. *v.* King, Dav. & M. 741. See, as to the purchase of goods by two, without the expectation of paying for them, Commonwealth *v.* Eastman, 1 Cush. 189.

[9] The State *v.* Simons, 4 Strob. 266; Bean *v.* Bean, 12 Mass. 20, 21; Reg. *v.* Peck, 9 A. & E. 686; s. c. nom. Peck *v.* Reg., 1 Per. & D. 508. Hartmann *v.* Commonwealth, 5 Barr, 60, was decided under a statute. See also Johnson *v.* Davis, 7 Texas, 173; Whitman *v.* Spencer, 2 R. I. 124; Hall *v.* Eaton, 25 Vt. 458; Reg. *v.* Creese, Law Rep. 2 C. C. 105.

[10] Rex *v.* Mott, 2 Car. & P. 521.

similar conspiracies to cheat individuals,[1] indictable at the common law.

§ 207. **Cheating a Partner.** — It was recently held in England, that, if a partner and third person conspire to deprive the other partner, by false entries and documents, of his interest in some of the property when the accounts are taken to make a division on dissolving the partnership, the conspiracy is indictable; though, if the fraud had been actually accomplished without the conspiracy, it would not be cognizable by the criminal law. "No one," said Cockburn, C. J., "would wish to restrict the law so that it should not include a case like the present."[2]

§ 208. **Fraud in electing Directors.** — An apt illustration of conspiracy to accomplish a lawful object by unlawful means, is a combination to procure certain persons to be elected directors of a mutual insurance company, and thereby get employment for the conspirators in the company's service. Here the end is lawful; but, if to accomplish it the conspirators are to issue fraudulent policies of insurance to persons who shall merely vote on them for directors, the fraudulent means render the combination indictable. And though, in the case where these facts appeared, the understanding was, that the policies were to be approved in due form and on regular application, by the requisite number of directors not cognizant of the fraud; and though, in point of law, the policies might be binding on all the parties; still the court held the result to be the same.[3]

§ 209. **Many to be defrauded.** — It can be no objection that the object of the conspiracy is to defraud many persons, or the public generally, instead of a single individual. Indeed, there are principles of the criminal law rendering the combination the more obnoxious in proportion to the numbers against whom it is directed; just as public nuisances and numerous other things are crimes, merely because they operate against many, rather than one.[4] Thus, —

Bank of Issue. — In New Jersey, the court — being, in consequence of a previous decision, doubtful whether a conspiracy can be a crime where its object is a civil injury to one person by

[1] See the cases cited ante, § 198.

[2] Reg. *v.* Warburton, Law Rep. 1 C. C. 274, 276. The principle of this case followed in The State *v.* Cole, 10 Vroom, 324.

[3] The State *v.* Burnham, 15 N. H. 396.

[4] Vol. I. § 232, 235, 236, 243–246, 264; Rex *v.* De Berenger, 3 M. & S. 67, 2 Russ. Crimes, 3d Eng. ed. 679, 680.

unindictable means — decided, that a confederacy to defraud an incorporated bank of issue, whereby its bills in circulation among the public become liable to depreciation or to be made worthless, is of so public a nature as to be criminally cognizable on this principle.[1]

Stocks. — On a like principle, a conspiracy to raise unduly the price of a particular kind of stock in the market, by circulating falsehoods, and thus defrauding the public, is punishable.[2]

Municipality — Other Corporations. — A conspiracy to defraud a city is, therefore, indictable, even though it should not be deemed so to conspire in like manner against an individual.[3] And always, where the fraud is aimed at numbers or a corporation,[4] it is deemed at least as reprehensible in the law as where a single individual is meant to be the victim.

§ 210. **No particular Person — (Spurious Goods on Market).** — Therefore conspirators need not have in mind any particular individual to be defrauded. And the corrupt combination was held sufficient where its object was the manufacture of spurious indigo, to be sold at auction for good; the court observing, "We think the offence to be greatly aggravated by the undistinguishing mischief that was designed."[5]

§ 211. **Thing to be obtained — (Chose in Action — Real Estate — Contract — Debt remitted).** — It is no objection to a conspiracy being indictable that its end is to obtain *choses in action*,[6] instead of coin; or to get the ownership[7] or the possession[8] of real estate, instead of personal; or to work out its results through the means of a contract, which might form the basis of a civil suit;[9] or to

[1] The State *v.* Norton, 3 Zab. 33. See ante, § 198, 207.

[2] Rex *v.* De Berenger, supra; Reg. *v.* Gurney, 11 Cox C. C. 414; Reg. *v.* Brown, 7 Cox C. C. 442; Reg. *v.* Esdaile, 1 Fost. & F. 213.

[3] The State *v.* Young, 8 Vroom, 184.

[4] Lambert *v.* People, 7 Cow. 166, 9 Cow. 578; Clary *v.* Commonwealth, 4 Barr, 210; Rex *v.* Edwards, 8 Mod. 320; Rex *v.* Herbert, 2 Keny. 466; Rex *v.* Watson, 1 Wils. 41; Reg. *v.* Absolon, 1 Fost. & F. 498; Commonwealth *v.* Foering, 4 Pa. Law Jour. Rep. 29.

[5] Commonwealth *v.* Judd, 2 Mass. 329. And see Reg. *v.* King, Dav. & M. 741, 7 Q. B. 782, 13 Law J. N. S. M. C. 118, 8 Jur. 662, S. C. in error, 14 Law J. N. S. M. C. 172, 9 Jur. 833.

[6] Stebbins, Senator, in Lambert *v.* People, 9 Cow. 578, 598.

[7] People *v.* Richards, 1 Mich. 216.

[8] The State *v.* Shooter, 8 Rich. 72.

[9] Reg. *v.* Gompertz, 9 Q. B. 824; Reg. *v.* Kenrick, 5 Q. B. 49, 62, Dav. & M. 208, wherein Lord Denman, C. J., says of Rex *v.* Pywell, 1 Stark. 402, which has been sometimes understood to maintain a contrary doctrine: "The acquittal was directed, not because an action might have been brought on a warranty, but because one of the two defendants, though acting in the sale, was not shown to have been aware that a fraud was practised."

get a part of a debt remitted by the person to whom it is payable, instead of directly procuring things valuable from him.[1]

§ 212. **Payment of Just Debt.** — We shall see, in the law of false pretences, that one is not indictable who, by such a pretence, induces another to pay a sum he owes, already due.[2] And a like rule has been held, doubtless correctly, in conspiracy.[3]

Personating Officer. — But, if the conspirators pretend to be officers armed with legal process, and threaten arrest, and thus extort for the debt a security which the creditor has no right to demand, the case is otherwise, and they become liable by reason of the illegal means.[4]

§ 213. **Limits of foregoing Doctrine.** — It may not be possible to state all the limits, known to the law, to the foregoing doctrines respecting conspiracy to defraud individuals; but every general doctrine, throughout our jurisprudence, is more or less qualified and restrained by other doctrines. On the present topic, we have few decisions disclosing limitations; because, in nearly every reported case, the court has sustained the prosecution, unless some defect of form has appeared in the indictment. Plainly, if the thing contemplated by the conspirators to be done, whether as means or end, was neither in civil jurisprudence nor criminal a cheat, the prosecution could not be sustained.

§ 214. — **Illustrations — (Bank-checks and no Deposits — Married Woman — Office in Illegal Company).** — On this ground, perhaps, the New Jersey case of The State *v.* Rickey[5] should have proceeded. It was there held, that a conspiracy to obtain money from a bank, by the conspirators severally drawing their checks for it, when they had no funds in the bank, was not indictable; and we may well doubt, whether any one man can be said to defraud such an institution when he simply asks, and it allows, an overdraught of his account.[6] In like manner, where the

And see Act of Crimes and Punishments, A. D. 1844, p. 210; 7th Report of Eng. Crim. Law Com. A. D. 1843, p. 90. See also Bloomfield *v.* Blake, 6 Car. & P. 75; Reg. *v.* Carlisle, Dears. 337, 25 Eng. L. & Eq. 577.

[1] Reg. *v.* Carlisle, Dears. 337, 25 Eng. L. & Eq. 577, 23 Law J. N. s. M. C. 109, 18 Jur. 386.

[2] Post, § 466.

[3] People *v.* Bradford, 1 Wheeler Crim. Cas. 219.

[4] Bloomfield *v.* Blake, 6 Car. & P. 75. And see The State *v.* Shooter, 8 Rich. 72.

[5] The State *v.* Rickey, 4 Halst. 293.

[6] The prosecution likewise did not succeed in Commonwealth *v.* Eastman, 1 Cush. 189.

common-law rules of property between husband and wife prevail, an indictment cannot be maintained for a conspiracy to cheat a *feme covert* of a promissory note, given her for her share in the estate of a deceased person; because, in law, the note is the husband's, who, instead of the wife, is legally the victim of the conspiracy.[1] Again, there is nothing unlawful in conspiring to deprive a man of the office of secretary to an illegal company.[2] In short, where there is no evil intent and nothing unlawful appears, an indictment will not lie.[3]

§ 215. Secondly. *Conspiracies to injure Individuals otherwise than by Fraud:* —

Any Injury. — The same reason which renders a conspiracy to defraud individuals indictable, applies equally to one whose object is any other kind of injury, either to their property or person.[4] Here also the act contemplated by the conspirators need not be such as is criminal when undertaken or accomplished by one alone; though, if it is such an act, the conspiracy will generally be indictable even as an attempt, on the ground before stated.[5]

Extort Money. — A conspiracy to extort money[6] is an illustration of a criminal attempt; while, if extortion were not a crime, still the combination would doubtless be indictable for the other reason.

§ 216. **Other Illustrations — (Injure Man's Trade — Title to Real Estate — Marriage — False Accusation — Auction — Theatre — Hiss Actor).** — Some examples, in which the act would not be punishable in one, are the following: a conspiracy to injure a man's trade of card-maker, by giving his apprentice money to put grease into the paste used in manufacturing the cards;[7] to create

[1] Commonwealth *v.* Manley, 12 Pick. 173. And see Vol. I. § 738–748.

[2] 2 Russ. Crimes, 3d Eng. ed. 688; Rex *v.* Stratton, 1 Camp. 549, note. And see Reg. *v.* Hunt, 8 Car. & P. 642.

[3] And see The State *v.* Flynn, 28 Iowa, 26.

[4] "There can be no doubt," says Hawkins, "that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law; as where divers persons confederate together by indirect means to impoverish a third person, or falsely and maliciously to charge a man with being the reputed father of a bastard child, or to maintain one another in any matter whether it be true or false." 1 Hawk. P. C. Curw. ed. p. 446. **Assault and Battery.** — A conspiracy to commit an assault and battery has been held, in Pennsylvania, to be indictable. Commonwealth *v.* Putnam, 5 Casey, 296. And see ante, § 62.

[5] Ante, § 195.

[6] Rex *v.* Hollingberry, 6 D. & R. 345, 4 B. & C. 329; Reg. *v.* Tracy, 6 Mod. 178; Robertson's Case, 1 Broun, 295.

[7] Rex *v.* Cope, 1 Stra. 144.

a specious title to an estate, by one of the conspirators, who is a man, marrying, under the assumed name of its owner, the other conspirator, a woman;[1] and to get money out of a person by bringing against him a false charge, whether of a thing criminal or not,[2] or to procure him to be arrested.[3] Likewise an indictable conspiracy occurs where a knot of men go to a public auction, on the mutual understanding that one only shall bid for any particular article, and after the auction is over they shall resell among themselves alone, at fair prices, the articles bought, sharing the difference between the buying and selling prices; because owners, offering goods at auction, justly expect an open competition from the public.[4] In like manner, though an audience at a theatre may lawfully express, by applause or hisses, the emotions which naturally arise at the moment, yet a conspiracy to hiss an actor, or damage a piece, is indictable.[5]

§ 217. **Charge falsely with Crime — Less than Crime.** — We shall have occasion presently to consider conspiracies to divert corruptly the course of justice in the courts;[6] but, aside from this, it is indictable to conspire to charge one falsely with a crime, even though the purpose is not to go so far as to get legal process against him.[7] Indeed, the accusation need not necessarily be even of what amounts to a crime; for, in England, where fornication is only an ecclesiastical offence, a conspiracy to charge one wrongfully with being the father of a bastard child is indictable, apparently without reference to compelling him to pay money for its support, but simply on the ground of defamation of character, as bringing him into public disgrace.[8] Therefore we shall prob-

[1] Rex *v.* Robinson, 1 Leach, 4th ed. 87, 2 East P. C. 1010.

[2] Rex *v.* Rispal, 1 W. Bl. 368, 3 Bur. 1320.

[3] Elkin *v.* People, 28 N. Y. 177.

[4] Levi *v.* Levi, 6 Car. & P. 239.

[5] Clifford *v.* Brandon, 2 Camp. 358; Anonymous, cited 6 T. R. 628; post, § 308, note.

[6] Post, § 219 et seq.

[7] Commonwealth *v.* Tibbetts, 2 Mass. 536. And see Johnson *v.* The State, 2 Dutcher, 313. So in Scotland also. 1 Alison Crim. Law, 369. But in Scotland the doctrines of conspiracy have not been as much developed as in England and this country.

[8] Reg. *v.* Best, 2 Ld. Raym. 1167, 1 Salk. 174, 6 Mod. 137, 185, Holt, 151; Timberley *v.* Childe, 1 Sid. 68; Rex *v.* Armstrong, 1 Vent. 304. And see Vol. I. § 591 and note; 2 Russ. Crimes, 3d Eng. ed. 676, 678, 683; Rex *v.* Rispal, 1 W. Bl. 368, 3 Bur. 1320; The State *v.* Buchanan, 5 Har. & J. 317, 351, 352; Johnson *v.* The State, 2 Dutcher, 313; 1 Trem. P. C. 82, 83. In a civil case it has been held, that a conspiracy to vex and harass a person, by having him subjected to an inquisition of lunacy without any probable cause, is actionable. Davenport *v.* Lynch, 6 Jones, N C. 545.

ably find, that Gabbett limits the doctrine within too narrow bounds when he says: "The fair result of the cases appears to be, that the mere conspiracy to slander a man will not be sufficient; but that there must be combined with it the imputation of a crime cognizable either by the temporal or ecclesiastical courts; or else an intent, by means of such false charge, to extort money from the party."[1]

§ 218. **Burden Parish with Pauper.** — The English books furnish numerous instances of criminal proceedings against overseers of the poor and others, for conspiring to charge a particular parish with the support of a pauper, to the relief of another parish. Thus, —

Letting Pauper Land, &c. — A conspiracy to let land to such a person with the intent thereby to shift the burden of his maintenance, appears to have been deemed indictable;[2] and there are other circumstances in which the like principle is recognized.[3]

Procuring Pauper's Marriage. — But the common corrupt method of effecting the change of settlement is to procure one pauper to marry another: and here, if, with no artifice or wrongful practice, men combine to give paupers money to carry out their own voluntary wish of intermarrying, which would not otherwise be gratified, the conspiracy is not criminal, whatever be its secret motive. On the other hand, if the marriage is to be brought about through any artifice or constraint of the will, as by violence or threats or other undue means, the conspiracy is indictable. Matrimony is a thing of public interest: it should be free to all, yet imposed by force or fraud on none: and these considerations enter into the decision of this class of questions.[4]

§ 219. Thirdly. *Conspiracies to disturb the Course of Government and of Justice:* —

Generally Punishable. — We saw, in the preceding volume,[5] what efforts to injure or destroy the government, or to impair its several functions, are punishable when put forth by a single indi-

[1] 1 Gab. Crim. Law, 252. See also Vol. I. § 591 and note.

[2] Rex *v.* Edwards, 8 Mod. 320.

[3] Rex *v.* Warne, 1 Stra. 644; Rex *v.* Flint, Cas. temp. Hardw. 370; Rex *v.* Rusby, 1 Bott P. L. 335; Reg. *v.* Storwood, 9 Jur. 448; Reg. *v.* Jennings, 1 New Sess. Cas. 488; Rex *v.* Edwards, 8 Mod. 320.

[4] 2 Russ. Crimes, 3d Eng. ed. 681, 862; Rex *v.* Fowler, 1 East P. C. 461; Rex *v.* Edwards, 8 Mod. 320, 11 Mod. 386, 2 Stra. 707; Rex *v.* Compton, Cald. 246; Rex *v.* Tarrant, 4 Bur. 2106; Rex *v.* Watson, 1 Wils. 41; Rex *v.* Herbert, 2 Keny. 466; Rex *v.* Seward, 3 Nev. & M. 557, 1 A. & E. 706.

[5] Vol. I. § 456–485.

vidual. And there is scarcely need to add, that conspiracies to do any of those acts are generally crimes, on the ground of attempt, as before explained.[1] Thus, —

Indict falsely — Process of Court — Fabricate Testimony, &c. — A conspiracy to indict one falsely,[2] or to procure any process against one for purposes of oppression or private ends,[3] or in any way to fabricate or suppress testimony in a court of justice,[4] or to prevent a prosecution,[5] is an indictable offence.

§ 220. **Not Criminal performed by one.** — But the doctrine of combinations enhancing the public danger,[6] applies also under our present head; and, therefore, a conspiracy against the government or its justice need not be to do a thing which would be criminal performed by one.[7]

Criminal Proceedings for Private Ends. — A good illustration of this is Sir Anthony Ashley's case,[8] reported by Coke. The conspirators were to proceed criminally against him for murder, and to divide among themselves his estate after his attainder; and it was resolved, that, "be Sir Anthony guilty or not guilty of the said murder, yet the defendants are punishable for the great and heinous misdemeanor and conspiracy, *scil.*, for promising of the said bribes and rewards to suborn the said Henry Smith to accuse the plaintiff of the said murder eighteen years passed, and the articles in writing to share and divide the estate of Sir Anthony after the attainder; for this corrupt conspiracy, and great and perilous practice and misdemeanor, the defendants shall be punished, let Sir Anthony be guilty or not in the said crime. And it is a great indignity offered to the king, for any subject to presume to covenant or assume that the king shall grant probation or pardon, or that the estate of any man shall be shared and divided before his attainder." Here was a combined oppression attempted against a subject, who, if guilty,

[1] Ante, § 195.

[2] Rex *v.* Spragg, 2 Bur. 993; Rex *v.* Macdaniel, 1 Leach, 4th ed. 44; Sydenham *v.* Keilaway, Cro. Jac. 7, pl. 9; Reg. *v.* Best, 1 Salk. 174, 2 Ld. Raym. 1167, 8 Mod. 321; 1 Hawk. P. C. Curw. ed. p. 444, § 2.

[3] Slomer *v.* People, 25 Ill. 70.

[4] The State *v.* De Witt, 2 Hill, S. C. 282; Rex *v.* Mawbey, 6 T. R. 619, 2 Russ. Crimes, 3d Eng. ed. 677–680; Rex *v.* Steventon, 2 East, 362; Rex *v.* Johnson, 2 Show. 1.

[5] Claridge *v.* Hoare, 14 Ves. 59, 65.

[6] Ante, § 180 et seq.

[7] Rex *v.* Mawbey, 6 T. R. 619, 2 Russ. Crimes, 3d Eng. ed. 677.

[8] Ashley's Case, 12 Co. 90. See Parker *v.* Huntington, 2 Gray, 124; Newall *v.* Jenkins, 2 Casey, 159.

had still the right to expect all things against him to be done in the ordinary course: together with the perversion of public justice to private ends.[1]

Associations against Crime. — But associations to bring criminals to punishment for the public good are not illegal.[2]

§ 221. **Malicious Prosecution.** — "Neither," says Hawkins, "doth it seem to be any justification of a confederacy to carry on a false and malicious prosecution, that the indictment or appeal which was preferred, or intended to be preferred, in pursuance of it, was insufficient, or that the court wherein the prosecution was carried on, or designed to be carried on, had no jurisdiction of the cause, or that the matter of the indictment did import no manner of scandal, so that the party grieved was in truth in no danger of losing either his life, liberty, or reputation. For notwithstanding the injury intended to the party against whom such a confederacy is formed may perhaps be inconsiderable, yet the association to pervert the law, in order to procure it, seems to be a crime of a very high nature, and justly to deserve the resentment of the law."[3]

§ 222. **Procure Office.** — "A conspiracy," observes Russell,[4] "to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs, is a misdemeanor at common law. The counsel for the defendant proposed to argue, that the indictment was bad on the face of it, as it was not a misdemeanor at common law to sell or purchase an office like that of a coast waiter, and that, however reprehensible such a practice might be, it could only be made an indictable offence by act of Parliament. But Lord Ellenborough, C. J., said, 'If that be a question, it must be debated on a motion in arrest of judgment, or on a writ of error. But after reading the case of Rex *v.* Vaughan,[5] it will be very difficult to argue that the offence charged in the indictment is not a misdemeanor.' And Grose, J., in passing sentence, likewise observed, that there could be no

[1] And see 1 Hawk. P. C. Curw. ed. p. 447, § 4; 6th ed. c. 72, § 4; The State *v.* Enloe, 4 Dev. & Bat. 373; Rex *v.* Hollingberry, 4 B. & C. 329, 6 D. & R. 345.

[2] 2 Russ. Crimes, 3d Eng. ed. 677; Floyd *v.* Barker, 12 Co. 23. See Commonwealth *v.* Leeds, 9 Philad. 569; People *v.* Saunders, 25 Mich. 119.

[3] 1 Hawk. P. C. Curw. ed. p. 446, § 8. And see 2 Russ. Crimes, 3d Eng. ed. 676; Bloomfield *v.* Blake, 6 Car. & P. 75.

[4] 2 Russ. Crimes, 3d Eng. ed. 680.

[5] Rex *v.* Vaughan, 4 Bur. 2494.

doubt that the indictment was sufficient, and that the offence charged was clearly a misdemeanor at common law."[1]

§ 223. **Corrupt Appointment.** — The doctrine of the last section seems to be sustainable, even in England, on the simple ground of attempt,[2] without resorting to that of corrupt combination, peculiar to conspiracy.[3] *A fortiori*, the common-law rule must be the same in this country, where no bargaining for office is allowable. In Virginia, a corrupt agreement between two justices of the peace, in whom was the power of appointment, that the first should vote for a certain third person as commissioner, in consideration of the second voting for a certain other person as clerk, and *vice versa*, was held to be, when executed, indictable at the common law, though not within the statute against buying and selling offices.[4] And nothing appears in the case showing, that it would not have been equally indictable, if not executed.

§ 224. **Hatred to Government — Changes of Laws — Petition — Debate.** — In England, moreover, a conspiracy to excite hatred in the inhabitants of one part of the United Kingdom against those of another part; or to create disaffection or hostility toward the government; or to compel it, by force, to change the laws, — is indictable; but the doctrine is not carried so far as to abridge the just liberty of popular debate, or of petition.[5] In this country, we protect, with even nicer care, the right of the masses to discuss public affairs, and to ask redress for real and imaginary grievances; yet no reason appears why the general doctrine does not prevail here the same as in England. The reader, however, in examining this and other like questions, should not forget, that we do not have common-law offences against the United States, but only against the States.[6]

§ 225. **Revenue.** — Of course, a conspiracy tending to lessen the governmental revenue is indictable.[7] And it is so under the United States statutes.[8]

[1] Rex *v.* Pollman, 2 Camp. 229.

[2] 1 Russ. Crimes, 3d Eng. ed. 147; ante, § 195.

[3] Ante, § 180 et seq.

[4] Commonwealth *v.* Callaghan, 2 Va. Cas. 460.

[5] Reg. *v.* Vincent, 9 Car. & P. 91; O'Connell *v.* Reg. 11 Cl. & F. 155, 234; s. c. in earlier stages, 2 Townsend, St. Tr. 392; Reg. *v.* Shellard, 9 Car. & P. 277.

[6] Vol. I. § 198–202.

[7] Rex *v.* Starling, 1 Sid. 174; 1 Gab. Crim. Law, 246; Reg. *v.* Blake, 6 Q. B. 126.

[8] United States *v.* Dennee, 3 Woods, 47; United States *v.* Miller, 3 Hughes, 553; United States *v.* Rindskopf, 6 Bis. 259; United States *v.* Graff, 14 Blatch 381; United States *v.* Walsh, 5 Dil. 58.

§ 226. Fourthly. *Conspiracies to create Public Breaches of the Peace:* —

General Doctrine — Riots, &c. — All breaches of the peace, even by one, all employment of physical force, even to the injury of individuals only, being indictable,[1] there is little scope for conspiracies of this kind, except when they are criminal as attempts, on principles before laid down.[2] Riots and the like are partly executed conspiracies to break the peace; and there may be combinations to commit them, indictable as conspiracies before they ripen into the substantive offences.[3] Under our present head, however, we have few judicial decisions to guide us.[4]

§ 227. Fifthly. *Conspiracies to create Public Nuisances, and do other like Injuries:* —

General Doctrine. — Under this obvious head, we find ourselves almost as destitute of authorities as under the last, and for like reasons. Still there is no question, that conspiracies to commit offences of this kind may be indictable when the thing to be done would not be so if actually performed, much less if merely attempted, by a single individual.

§ 228. **Religion — Sepulture, &c.** — "The same principle," says Gabbet,[5] "which restrains any combination to defeat the public justice of the country must also apply to conspiracies to subvert religion;[6] and even a confederacy to do an act which offends against public decency and good-manners will be sufficient to maintain an indictment for a conspiracy; as in Young's case, where the master of a workhouse, a surgeon, and another person, had conspired to prevent the burial of a person who died in the workhouse; the taking of a dead body, whether for the purpose of dissection, or for any indecent exhibitions, being *contra bonos mores*, and therefore indictable."[7]

§ 229. **Defeat Operation of Statute.** — And this doctrine may be extended wide, to cover any public interest which the law has established. For example, a conspiracy to defeat the operation

[1] Vol. I. § 548; ante, ASSAULT.
[2] Ante, § 195.
[3] 2 Chit. Crim. Law, 506, note; 1 Gab. Crim. Law, 246.
[4] See Hunter's Case, 1 Swinton, 550; Anderson v. Commonwealth, 5 Rand, 627.
[5] 1 Gab. Crim. Law, 245, 246.
[6] Fitzg. 64.
[7] Young's Case, cited 2 T. R. 734.

of a statute of a public nature is indictable.[1] But if the statute is repealed before trial, no conviction can be had.[2]

§ 230. Sixthly. *Conspiracies concerning Wages and the like:* — **English Doctrine.** — The subject of this class of conspiracies has been frequently before the English courts, and it is in England in some measure affected by acts of Parliament.[3] Precisely what is pure common-law doctrine there, it is not easy to state. But, in general terms, combinations among workmen to raise the price of wages, and other combinations of the like sort, are indictable under the English common law.[4] "Each may," said Grose, J., "insist on raising his wages, if he can; but, if several meet for the same purpose, it is illegal, and the parties may be indicted for a conspiracy."[5] And Lord Mansfield observed in another case: "Persons in possession of any articles of trade may sell them at such prices as they individually may please; but, if they confederate and agree not to sell them under certain prices, it is conspiracy. So every man may work at what price he pleases, but a combination not to work under certain prices is an indictable offence." In the case in which these observations occurred, it was held that an indictment may be maintained for a conspiracy to impoverish a man by preventing him from working at his trade.[6] The point of this case is a sound determination; but, as to the points presented in the *dicta* just quoted, they do not quite accord with what was laid down by Erle, J., in a later case. "Nothing can be more clearly established in point of law," he said, "than that workmen are at liberty, while they are perfectly free from engagement, and have the option of entering into employ or not, to agree among themselves to say, 'We will not go into any employ unless we can get a certain rate of wages.'" It should be observed, however, that this is only restating what is enacted by Stat. 6 Geo. 4, c. 129, § 4. But he considered this to be the utmost extent of the right. If, for example, persons conspire to persuade the workmen whom a man may have in his employment to leave him unless he will raise their wages, or

[1] Hazen *v.* Commonwealth, 11 Harris, Pa. 355; Reg. *v.* Bunn, 12 Cox C. C. 316, 4 Eng. Rep. 564.

[2] Powell *v.* People, 5 Hun, 169.

[3] 2 Russ. Crimes, 3d Eng. ed. 688. And see ante, § 175, note, par. 3.

[4] See ante, § 200; Rex *v.* Bykerdike, 1 Moody & R. 179; Rex *v.* Norris, 2 Keny. 300.

[5] In Rex *v.* Mawbey, 6 T. R. 619, 636.

[6] Rex *v.* Eccles, 1 Leach, 4th ed. 274, 276. And see Reg. *v.* Hewitt, 5 Cox C. C. 162; Reg. *v.* Shepherd, 11 Cox C. C. 325.

otherwise change the manner of conducting his business, — or conspire to force persons, by intimidation, to leave their employment, — the conspiracy is indictable.[1] Yet here we come upon another provision of the statute.[2] Indeed, the whole subject is in modern times so far regulated by statutes, that it is nearly useless to look into any recent English reports for help concerning the doctrines of the common law.

§ 231. **American Doctrine.** — The general doctrine of the older English books on this subject is received as belonging to the common law of this country.[3] Yet it is subject to restrictions here, and we have not sufficient adjudications to teach us exactly what these restrictions are. Under the statute of New York, whereby conspiracies are indictable whose object is "to commit any act injurious to . . . trade or commerce," the court held, that a combination of journeymen workmen, of any trade or handicraft, to compel master-workmen or other journeymen to obey rules established by the conspirators for the regulation of the price of labor, is within the prohibition. And Savage, C. J., observed: "It is important to the best interests of society, that the price of labor be left to regulate itself, or, rather, be limited by the demand for it. Combinations and confederacies to *enhance* or *reduce* the prices of labor, or of any article of trade or commerce, are injurious. They may be oppressive, by compelling the public to give more for an article of necessity or of convenience than it is worth; or, on the other hand, by compelling the labor of the mechanic for less than its value. Without any officious or improper interference on the subject, the price of labor or the wages of mechanics will be regulated by the demand for the manufactured article, and the value of that which is paid for it; but the right does not exist either to enhance the price of the article or the wages of the mechanic by any forced or artificial means. The man who owns an article of trade or commerce is not obliged to sell it for any particular price, nor is the mechanic obliged by law to labor for any particular price. He may say, that he will not make coarse boots for less than one dollar per

[1] Reg. *v.* Duffield, 5 Cox C. C. 404, 427, 431, &c.

[2] And see Reg. *v.* Rowlands, 17 Q. B. 671, 2 Den. C. C. 364, 5 Cox C. C. 436; Reg. *v.* Bunn, 12 Cox C. C. 316, 4 Eng. Rep. 564; Reg. *v.* Druitt, 10 Cox C. C. 592; Reg. *v.* Hibbert, 13 Cox C. C. 82.

[3] Commonwealth *v.* Hunt, 4 Met. 111; People *v.* Fisher, 14 Wend. 9. And see Reg. *v.* Hibbert, 13 Cox C. C. 82, 13 Eng. Rep. 433 and Moak's notes.

pair; but *he has no right to say, that no other mechanic shall make them for less.* The cloth merchant may say, that he will not sell his goods for less than so much per yard; but has no right to say, that any other merchant shall not sell for a less price. If one individual does not possess such a right over the conduct of another, no number of individuals can possess such a right. All combinations, therefore, to effect such an object are injurious, not only to the individuals particularly oppressed, but to the public at large."[1] Probably a close examination will show, that all these combinations are, in the end, even more injurious to those who enter into them than to any third persons; and especially more injurious to the parties when they succeed, than when they fail to accomplish their object.[2]

[1] People *v.* Fisher, 14 Wend. 9, 18. And see Master Stevedores' Association *v.* Walsh, 2 Daly, 1; Morris Run Coal Co. *v.* Barclay Coal Co., 18 Smith, Pa. 173.

[2] 1. Combinations of workmen to increase their wages, and of employers to diminish them, are both in a very high degree detrimental to the public interests; and ultimately, in an especial manner, to the interests of those engaged in them. This proposition results from a consideration of the familiar principles which regulate the economy of labor and of trade. It is not proposed to elucidate this topic at length here; but it will be plain to every one, that demand and supply, whether of labor, or of commodities which are the result of it, will be commensurate with each other, and regulate themselves as the drops of water find their respective positions in the ocean, by means which will create no violent upheaval of things, if left free from the disturbing force of extraneous influences. But if there is a combination to raise, by artificial means, the price of wages, and the combination succeeds, there follows an unnatural influx of labor into the particular business, and soon a part of the workmen cease to have employment, or else the price of their wages is unduly depressed. So where there is a combination to depress the wages, if it is successful it diminishes the number of laborers in the particular employment, then labor becomes scarce, then the price is unduly elevated. And the true prosperity of the country, and especially of the particular class of the community who are engaged in a given employment, whether as employers or employed, demands that all such combinations be, in some way, suppressed. But this may be true, while yet the combination is not indictable; and whether it is or not will depend upon the nature of it, and the means it uses to effect its objects, and some other things of this sort, as, also, the decision will be influenced much by the peculiar views of the judges before whom the question comes.

2. In England, indictments of this kind have almost always been more or less aided by statutes. We have seen, Vol. I. § 453, that there were there, at one time, statutes regulating the price of wages. And, as remarks Mr Longe, an English barrister, whose observations appear in the Report on Trades' Societies and Strikes, published by the National Association for the Promotion of Social Science, A. D. 1860, p. 339, since "the rate of wages, fixed by statute, was in every case the maximum rate which either the masters might give or workmen receive, so long as such legal rate existed a demand by either one or more workmen of wages above the legal rate was a contempt of the statute law." And see Mr. Longe's article for much interesting matter on the subject, including various statutory provisions. The result is, that perhaps at no time has the statutory law of England been such as to

§ 232. **Scotch Doctrine.** — This subject seems to be now regulated in Scotland by statute, the same as it is in England. We are, therefore, destitute of direct common-law authority, of a modern date, from either country. Hume, a writer of great eminence on the Scotch criminal law, introduces some old cases, decided before the modern statutes were enacted, as follows: "To the list of offences concerning trade, we have to add that of the unlawful combination of workmen to raise their wages. When such a project is attended, as has often been the case, with a tumultuous convocation of the lieges, or violence to the persons or property of individuals, or the writing of incendiary letters, or threats of mischief to masters or employers, it never has been doubted that there is here sufficient matter for a criminal indictment. The violence done, the tumult raised, the threats used, are here themselves the substantive grounds of charge; and that these things happened in pursuance of a combination of workmen to raise their wages, is an ingredient or qualification only of the main accusation. But some thought it not so clear, whether the same were true of a combination to raise wages, *not* accompanied with any act of violence or disorder, and prosecuted only in the course of the sudden *striking of work* by numbers at one time, — the raising of funds to support the adherents of the cause, — the refusal to work or hold intercourse with those who dissent, and other like measures, tending to distress their employers, and thus to force them into their terms."[1]

§ 233. **Special Nature of the Conspiracy — Other Workmen.** — Undoubtedly there may be, connected with even lawful attempts to raise wages, acts which every lawyer would hold to be indictable; while, on the other hand, no lawyer in our country would consider a mere combination, by any class of persons, to promote the interests of their particular trade, liable to be visited as crime. When, therefore, we are considering a conspiracy of this general sort, we must look into its special nature, and the particular means contemplated or employed; and decide the question of its indictability on principles relating to these, and

leave there the question of the conspiracies we are considering precisely as it stands in this country. I do not propose to attempt to forestall decision in our courts by further elucidations of the principles which govern this subject. It will probably be found, that this is a matter in which sound reason can do more to correct an evil than even sound law.

[1] 1 Hume Crim. Law, 2d ed. 488, 489.

not on such larger doctrines as would cover all forms of combination to promote common pecuniary interests. In this view it cannot be doubted, that, as held in New Jersey, a conspiracy by workmen agreeing to quit their employer in a body, unless certain other workmen are dismissed, and to notify their employer of such agreement, is indictable.[1] Here is an attempt by combination, not only to injure the employer, and interfere with the conduct of his business, but to injure other workmen of the same craft with the conspirators. Added to this, but perhaps not as being sufficient in itself, it is an attempt to interrupt the natural course of business in the community.

§ 234. Seventhly. *Conspiracies against both Individuals and the Community:* —

General Views. — The conspiracies last treated of are of a compound sort, embracing the two elements of injury to the individual and injury to the community. Indeed, there are few acts, belonging to any head in the criminal law, which do not have a somewhat twofold aspect, — as they affect the public, and particular persons. And perhaps some other of the unlawful combinations, already mentioned, might nearly as well be contemplated under this double head, as those last treated of and those which follow.

§ 235. Public Purity — Private Virtue — Fornication — Marriage. — Under this double head come conspiracies against chastity, the marriage laws, and the like. Thus, a conspiracy to procure a young woman to have carnal intercourse with a man is indictable, especially if force or false pretences are to be used with her, and probably if they are not, even in localities where fornication and adultery are not crimes.[2] *A fortiori*, the conspiracy is so if there is to be a marriage ceremony performed, invalid in law, but believed by her to be good.[3] So also a confederacy to

[1] The State *v.* Donaldson, 3 Vroom, 151.

[2] Reg. *v.* Mears, 2 Den. C. C. 79, Temp. & M. 414, 15 Jur. 66, 1 Eng. L. & Eq. 581; Rex *v.* Delaval, 3 Bur. 1434; Anderson *v.* Commonwealth, 5 Rand. 627. In a late Illinois case, the doctrine was laid down broadly, that it is indictable to conspire to seduce a female, whether the means proposed be lawful or unlawful. "Unlawful." — And Caton, C. J., said: "If the term unlawful [in the definition of a common-law conspiracy] means criminal, or an offence against the criminal law, and as such punishable then the objection taken to this indictment is good; for seduction, by our law, is not indictable and punishable as a crime. But by the common law governing conspiracies the term is not so limited." Smith *v.* People, 25 Ill. 17, 23. See ante, § 178.

[3] The State *v.* Murphy, 6 Ala. 765; Respublica *v.* Hevice, 2 Yeates, 114.

assist a female infant to escape from her father's control, with a view to marry her against his will;[1] or to commit fornication with her, of course against his will,[2] — is indictable at the common law. And the same is true, if the object of the confederacy is to entrap a girl by fraud, or coerce her by force, into a marriage.[3] Likewise it is indictable to conspire to persuade a young girl, even though she is not alleged to be chaste, to become a common prostitute.[4] All such combinations are gross violations of the public interests, on the one hand; and of private rights, private virtue, and private happiness, on the other.

V. *Statutory Conspiracies.*

§ 236. **How, in General.** — In some of the States, as Maine,[5] New York, New Jersey, Pennsylvania,[6] Georgia, Indiana,[7] Iowa,[8] and perhaps some of the others, there are statutes regulating, more or less, the general subject of conspiracy.

§ 237. **New York.** — In New York, "If two or more persons shall conspire, either, 1. To commit any offence; or, 2. Falsely and maliciously to indict another for any offence, or to procure another to be charged or arrested for any such offence; or, 3. Falsely to move or maintain any suit; or, 4. To cheat and defraud any person of any property by any means which are in themselves criminal; or, 5. To cheat and defraud any person of

[1] Mifflin *v.* Commonwealth, 5 Watts & S. 461. And see Reg. *v.* Blacket, 7 Mod. 39; Rex *v.* Thorp, 5 Mod. 221; Rex *v.* Serjeant, Ryan & Moody N. P. 352. Yet in a civil case in Massachusetts it was held, that a parent cannot maintain an action for enticing away a daughter between the ages of twelve and eighteen from his service, and procuring her marriage, without his consent, to a man of bad character, by fraudulent representations to the city clerk and to the magistrate. And Dewey, J., observed: "If the marriage of the daughter was a legal act [that is, if the marriage was valid], from the time of its consummation the daughter was legally discharged from all further duties to perform service for her parent, having assumed new relations inconsistent therewith. The only question, therefore, is, whether the marriage of the daughter was a legal one." Hervey *v.* Moseley, 7 Gray, 479, 483.

[2] Rex *v.* Grey, 9 Howell St. Tr. 127, 1 East P. C. 460, 1 Gab. Crim. Law, 247; s. c. nom. Gray's Case, Skin. 81.

[3] Rex *v.* Wakefield, 2 Townsend St. Tr. 112, 1 Bishop Mar. & Div. § 196, 2 Lewin, 279, 2 Russ. Crimes, 3d Eng. ed. 686.

[4] Reg. *v.* Howell, 4 Fost. & F. 160.

[5] See The State *v.* Ripley, 31 Maine, 386; The State *v.* Hewett, 31 Maine, 396.

[6] Clary *v.* Commonwealth, 4 Barr, 210. In this State there are some relevant old English enactments in force. See Lewis Crim. Law, 206.

[7] Landringham *v.* The State, 49 Ind. 186.

[8] The State *v.* Stevens, 30 Iowa, 391.

any property by any means which, if executed, would amount to a cheat, or to obtaining money or property by false pretences; or, 6. To commit any act injurious to the public health, to public morals, or to trade or commerce; or for the perversion or obstruction of justice or the due administration of the laws, — they shall be deemed guilty of a misdemeanor." And then it is provided, that no conspiracies but these shall be punishable criminally.[1] The provisions in New Jersey are the same, only they do not abrogate the common law; consequently, in the latter State, there are indictable conspiracies not within the statute.[2] Probably there is no State except New York in which the common-law doctrines on this subject are narrowed by legislation. Even in New York the enactment was intended, by the revisers who drew it, to be merely an embodiment of the common law.[3]

§ 238. **United States.** — We have also some particular statutory conspiracies created by the laws of the United States, there being no common-law offences against the United States government.[4]

VI. *Remaining and Connected Questions.*

§ 239. **Merger.** — The question, whether a conspiracy to commit an offence is, when executed, merged in the offence committed; and, if so, under what circumstances, — was sufficiently discussed in the preceding volume.[5]

§ 240. **Misdemeanor — How Punished.** — Conspiracy is misdemeanor, even in those cases where its object is the commission of a felony.[6] What the punishment of misdemeanor is at the common law, we saw in the former volume.[7] In Pennsylvania, it is laid down, that a conspiracy to commit an indictable offence cannot be punished more severely than the offence itself.[8] This

[1] People *v.* Fisher, 14 Wend. 9, 14. We have already seen, that, by other provisions in this statute, there must be an overt act in all conspiracies, except when their object is the commission of felony upon the person of another, or arson, or burglary. Vol. I. § 432; ante, § 180.

[2] The State *v.* Norton, 3 Zab. 33.

[3] People *v.* Fisher, 14 Wend. 9, 17.

[4] United States *v.* Cole, 5 McLean, 513; United States *v.* Hand, 6 McLean, 274; ante, § 225.

[5] Vol. I. § 787, 792, 814; The State *v.* Murphy, 6 Ala. 765; The State *v.* Noyes, 25 Vt. 415; Reg. *v.* Button, 11 Q. B. 929; People *v.* Richards, 1 Mich. 216; People *v.* Mather, 4 Wend. 229, 265; Commonwealth *v.* Kingsbury, 5 Mass. 106.

[6] People *v.* Mather, 4 Wend. 229, 265; Reg. *v.* Button, 11 Q. B. 929.

[7] Vol. I. § 940–945.

[8] Hartmann *v.* Commonwealth, 5 Barr, 60; Williams *v.* Commonwealth, 10 Casey, 178.

conclusion may have been derived somewhat from the particular terms of the statute, or from some peculiarity of Pennsylvania jurisprudence; while, on general principles, it is correct as applied to all that class of conspiracies which are mere attempts.[1] But where there is also the element of enhanced guilt growing out of combination,[2] and no statute directs how it shall be, the rule of law cannot, in reason, be such as is thus laid down. And in conspiracies to do what is not even indictable in one person, there is clearly no room for the application of this Pennsylvania doctrine.[3]

[1] Ante, § 195.

[2] Ante, § 180 et seq.

[3] See further, as to the punishment of conspiracy in Pennsylvania, Clary *v.* Commonwealth, 4 Barr, 210. And see The State *v.* Jackson, 82 N. C. 565.

CHAPTER XII.

CONTEMPT OF COURT AND THE LIKE.[1]

§ 241, 242. Introduction.
243–249. Against what Tribunal or Assemblage.
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§ 241. **Nature of the Subject.** — The subject of this chapter is analogous to that of the chapter in the preceding volume entitled "Quasi Crime in Rem." There it was shown, how property in things is lost by so using them that the law ceases to recognize the claim of the owner to them; in this chapter we shall see how men, placing themselves in opposition to the machinery of the law, are necessarily borne down by it, because the machinery will move on. In both instances, the act done may or may not be a crime indictable, and may or may not furnish ground for a civil suit by a party injured; but the consequence we are discussing, as flowing from the act, is, properly viewed, neither a punishment nor a civil redress. Yet sometimes the process of contempt has the practical effect of enforcing a civil right; sometimes it serves, in its measure, practically instead of punishment.

§ 242. **Scope of the Discussion.** — It is the purpose of this chapter to bring to view so much only of the law of contempt of court as will enable the reader to see its relation to that of crime proper.

How divided. — We shall consider, I. Against what Tribunal or Assemblage the Contempt may be committed; II. By what Act; III. The Consequences of the Contempt.

[1] For matter relating to this title, see Crim. Proced. I. § 868, 869; and Stat. Vol. I. § 461–463, 913, 1067. And see Crimes, § 137, 568.

I. *Against what Tribunal or Assemblage.*

§ 243. **Court of Record — Not of Record.** — No court of justice could accomplish the objects of its existence unless it could in some way preserve order, and enforce its mandates and decrees. The common method of doing these things is by the process of contempt. Therefore the power to proceed thus is incident to every judicial tribunal, derived from its very constitution, without any express statutory aid. The doctrine, in these broad terms, is generally asserted, and is believed to be sound: the narrower doctrine, about which there is no dispute, is, that this power is inherent in all courts of record.[1]

§ 244. *Contempts to Justices of the Peace:* —

How, in Absence of Statute. — A question has indeed been raised, whether the power belongs to justices of the peace, whose courts are both inferior ones and not of record. The Pennsylvania doctrine appears to be, that it does not, being unnecessary. The reason of this lack of necessity is stated to be, that the contempt is (what is true) an indictable offence, for which the magistrate may immediately bind over the offender, and compel him to find sureties for his good behavior, or imprison him on his failure to comply with this order;[2] while the process of committal for contempt, it is said, is one too liable to be abused to be intrusted to an inferior magistrate.[3] But the English[4] and better

[1] Stat. Crimes, § 137; Mariner *v.* Dyer, 2 Greenl. 165; The State *v.* White, T. U. P. Charl. 128, 136; Yates *v.* Lansing, 9 Johns. 395, 6 Johns. 337, 4 Johns. 317; The State *v.* Tipton, 1 Blackf. 166; Clark *v.* People, 1 Breese, 266; United States *v.* Hudson, 7 Cranch, 32, 34; Rex *v.* Cotton, W. Kel. 133; People *v.* Turner, 1 Cal. 152; Ex parte Adams, 25 Missis. 883; Morrison *v.* McDonald, 21 Maine, 550; The State *v.* Woodfin, 5 Ire. 199; Gates *v.* McDaniel, 3 Port. 356; Stuart *v.* People, 3 Scam. 395; Gorham *v.* Luckett, 6 B. Monr. 638; The State *v.* Matthews, 37 N. H. 450; Watson *v.* Williams, 36 Missis. 331; Ex parte Smith, 28 Ind. 47; In re Moore, 63 N. C. 397; Ex parte Robinson, 19 Wal. 505; First Congregational Church *v.* Muscatine, 2 Iowa, 69; People *v.* Wilson, 64 Ill. 195; The State *v.* Morrill, 16 Ark. 384. See, as illustrative, Janitor of Supreme Court, 35 Wis. 410.

[2] And see Richmond *v.* Dayton, 10 Johns. 393.

[3] Brooker *v.* Commonwealth, 12 S. & R. 175; Fitler *v.* Probasco, 2 Browne, 137. In Brooker *v.* Commonwealth, supra, Gibson, J., observed: "Were it necessary to the due administration of

[4] Rex *v.* Revel, 1 Stra. 420; Reg. *v.* Rogers, 7 Mod. 28, 1 Gab. Crim. Law, 287, 1 Chit. Crim. Law, 88, 112, 631. And see Rex *v.* Cotton, W Kel. 133 Harwood's Case, 1 Mod. 79

American[1] doctrine extends the authority to justices of the peace acting judicially, the same as to courts of record; though, as we shall by and by see,[2] not probably to quite the same degree. Indeed, we could hardly find any one substantial reason why a justice of the peace might, in every emergency, preserve order in his tribunal merely by binding over offenders to answer to an indictment before a higher tribunal, and be of good behavior, not applying equally to a judge holding a court of record.[3]

the laws, that justices of the peace should have the power of commitment for contempt, I would not hesitate to declare that the grant of the office carried with it, as an incident, all ancillary power which should be necessary to its complete execution. But as punishment of contempts by indictment is commensurate with this object, I am content that the law, in this respect, be held here as it is in England." This learned and usually accurate judge certainly mistook the English law, in supposing that it does not allow to justices of the peace the summary process for contempts in their presence. In a New York case, before a single judge at chambers, it was held, on a consideration of the statutes, that in this State justices of the peace have no power to commit persons refusing to be sworn as witnesses, in examinations before them on complaints in criminal causes. People *v.* Webster, 3 Parker, 503; s. p. Rutherford *v.* Holmes, 5 Hun, 317. Contra, Bowen *v.* Hunter, 45 How. Pr. 193.

[1] Lining *v.* Bentham, 2 Bay, 1; The State *v.* Johnson, 2 Bay, 385, 1 Brev. 155; Clark *v.* People, 1 Breese, 266; The State *v.* Copp, 15 N. H. 212; 1 Chit. Crim. Law, Am. ed. 88, note; The State *v.* Applegate, 2 McCord, 110; Hollingsworth *v.* Duane, Wal. C. C. 77; In re Cooper, 32 Vt. 253, Aldis, J., observing: "In England, this power is not confined to the superior courts. It is exercised by the courts of quarter-sessions, a tribunal composed of two justices of the peace, and charged with the trial of inferior offences. Rex *v.* Clement, 4 B. & Ald. 218, 229. So the court-leet, a tribunal of still inferior jurisdiction, had the same power; 8 Co. 38 *b*." p. 257.

Court Commissioner. — But a court commissioner, an officer known in some of our States, has not, it has been held in Wisconsin, this power unless conferred by statute. Haight *v.* Lucia, 36 Wis. 355.

[2] Post, § 263.

[3] In United States *v.* Hudson, 7 Cranch, 32, 34, it was observed: "To fine for contempt, imprison for contumacy, enforce the observance of order, &c., are powers which cannot be dispensed with in a court, because they are necessary to the exercise of all others." So, in New Hampshire, it being held that a justice of the peace may order to be expelled from his presence one whom he deems to be interrupting a trial, Gilchrist, J., delivering the opinion, observed: "The power of keeping order, and of requiring a decorous and proper demeanor in a court-room during the progress of a trial, lies at the very foundation of the administration of justice. Without it, there can be no law and no justice; for, if the law will not authorize the means necessary to insure its observance and proper administration, it must remain a dead letter. But the law never intended that the prisoner should have the power of stationing himself in any position he might desire during the trial. If it rested with him to select the location he might find most convenient, he might see fit to place himself upon the bench, or in the jury-box. He was present at this trial neither as a party nor as a witness. He went there to gratify his curiosity; and it behooved him so to conduct as not to disturb the proceedings of those who had duties to perform. These duties cannot be discharged unless the justice possesses the power, upon an emergency, to direct the removal of any individual

§ 245. **Justice acting ministerially.** — But where a magistrate acts ministerially and not judicially, he appears to stand on a different ground; and we may well receive the doctrine which has been laid down,[1] that then he cannot commit for contempt.

§ 246. **Statutory Regulations.** — Questions concerning contempts against the authority of justices of the peace are, in many of the States, regulated by statutes.

§ 247. *Contempts to Legislative Bodies, Officers, and Public Meetings:* —

Legislative Assemblies. — This power, of committal for contempt, extends also, in England, to the two Houses of Parliament severally;[2] and, in this country, to the Senate and House of Representatives of the United States;[3] and to the corresponding legislative bodies of the respective States.[4] These are all deemed courts of record for some purposes.[5]

§ 248. **Sheriffs, Constables, &c.** — But the power of such commitment does not belong properly to any officer who has no judicial or *quasi* judicial functions; though something analogous does, to some officers. Thus, a sheriff is a conservator of the

whose presence he may think prejudicial to the interests of justice. The law does not indeed authorize any court to act arbitrarily, and unreasonably exclude persons, but the right to have the courts open is the right of the public, and not of the individual. If every person for whom there is sufficient space has the right to be in court, he has a right to be in any part of it where there is sufficient space, and the inconvenience resulting from the exercise of such a right is a strong argument against its existence." The State *v.* Copp, 15 N. H. 212, 214, 215. **Judge of Probate.** — Relative to the power of commitment for contempt, possessed by a judge of probate, see In re Bingham, 32 Vt. 329; a case, however, depending mainly upon statutes.

[1] Fitler *v.* Probasco, 2 Browne, 137. And see Commonwealth *v.* Stuart, 2 Va. Cas. 320.

[2] May Parl. Law, 62, 69; Shaftsbury's Case, 1 Mod. 144, 6 Howell St. Tr. 1270, 1297; Murray's Case, 1 Wils. 299, 8 Howell St. Tr. 30; Rex *v.* Flower, 27 Howell St. Tr. 986, 8 T. R. 314; Crosby's Case, 3 Wils. 188, 19 Howell St. Tr. 1138, 1146, 1147, in which De Grey, C. J., observed: "This power of committing must be inherent in the House of Commons from the very nature of its institution; and, therefore, is a part of the law of the land. They certainly always could commit in many cases. In matters of elections, they can commit sheriffs, mayors, officers, witnesses, &c.; and it is now agreed that they can commit generally for all contempts." And see the text and notes, generally, in Thompson's Case, 8 Howell St. Tr. 1.

[3] Anderson *v.* Dunn, 6 Wheat. 204; Stewart *v.* Blaine, 1 MacAr. 453; Ex parte Nugent, 4 Pa. Law Jour. Rep. 220.

[4] Cushing's Law and Practice of Legislative Assemblies, pl. 533, 534, 608, 625–627, 655; Burnham *v.* Morrissey, 14 Gray, 226; The State *v.* Matthews, 37 N. H. 450. And see Falvey *v.* Massing, 7 Wis. 630.

[5] I state this as it is generally done in the books; but I doubt whether the right of a legislative body to punish for contempt is properly traceable to any power it may have as a court of record And see the note at the end of § 249.

peace, who may, and should, "arrest all persons, with their abettors, who oppose the execution of process."[1] And if a constable is preventing a breach of the peace, he may take into custody any one who resists him.[2]

§ 249. **Public Meetings.** — As to mere voluntary assemblages of people, though the law protects them, even in many circumstances rendering indictable those who disturb them,[3] and their officers may eject one who interrupts their deliberations, the same as any private person may put from his dwelling-house or other premises another who violates the conditions on which he was permitted to enter,[4] they cannot exercise the judicial function of punishing for contempt.[5]

[1] Kent, C. J., in Coyles *v.* Hurtin, 10 Johns. 85.

[2] Levy *v.* Edwards, 1 Car. & P. 40.

[3] Vol. I. § 542; post, DISTURBING MEETINGS.

[4] Doyle *v.* Falconer, Law Rep. 1 P. C. 328, 340.

[5] 1. **Some Questions discussed.** — There are, lying within the general scope of these three sections, some questions upon which opinions may in a degree differ, or upon which they are not distinct. **Colonial Legislatures.** — Thus, not many years ago, a case went up to the Privy Council, in England, from the province of Newfoundland, presenting, in the language of Mr. Baron Parke, who delivered the opinion of this high English tribunal, the question "whether the House of Assembly [of the province] had the power to arrest and bring before them, with a view to punishment, a person charged by one of its members with having used insolent language to him out of the doors of the House, in reference to his conduct as a member of the Assembly, — in other words, whether the House had the power, such as is possessed by both Houses of Parliament in England, to adjudicate upon a case of contempt, or breach of privilege." And the learned judge proceeded to show, that, in the royal commission for the establishment of the colonial legislature, there was no express language conveying the power; and the question was simply, whether, by force of the common law, and of the legal necessities of the case, the power attached to the legislative body. Upon this point he observed: "Their Lordships see no reason to think, that, in the principles of the common law, any other powers are given them [the Assembly] than such as are necessary to the existence of such a body, and the proper exercise of the functions which it is intended to execute." "We feel," he added, "no doubt, that such an assembly has the right of protecting itself from all impediments to the due course of its proceeding. To the full extent of every measure which it may be really necessary to adopt to secure the free exercise of their legislative functions, they are justified in acting by the principles of the common law. But the power of punishing any one for past misconduct as a contempt of its authority, and adjudicating upon the fact of such contempt, and the measure of punishment, as a judicial body, irresponsible to the party accused, whatever the real facts may be, is of a very different character, and by no means essentially necessary for the exercise of its functions as a local legislature, whether representative or not. All these functions may be well performed without this extraordinary power, and with the aid of the ordinary tribunals to investigate and punish contemptuous insults and interruptions. These powers certainly do not exist in corporate or other bodies assembled, with authority, to make by-laws for the government of particular trades, or united numbers of

II. *By what Act.*

§ 250. **Limit of the Discussion — Leading Doctrine.** — We should travel too far from the plan of these volumes if we were to treat of the question presented under this sub-title in its application

individuals. The functions of a colonial legislature are of a higher character, and it is engaged in more important objects; but still there is no reason why it should possess the power in question. It is said, however, that this power belongs to the House of Commons in England; and this, it is contended, affords an authority for holding that it belongs, as a legal incident, by the common law, to an assembly with analogous functions. But the reason why the House of Commons has this power is, not because it is a representative body with legislative functions, but by virtue of ancient usage and prescription, the *lex et consuetudo parliamenti*, which forms a part of the common law of the land, and according to which the High Court of Parliament, before its division, and the Houses of Lords and Commons since, are invested with many peculiar privileges, that of punishing for contempt being one. And besides, this argument from analogy would prove too much, since it would be equally available in favor of the assumption, by the Council of the Island, of the power of commitment exercised by the House of Lords, as well as in support of the right of impeachment by the Assembly, — a claim for which there is not any color of foundation. It is to be remarked, that all those bodies which possess the power of adjudication upon, and punishing in a summary manner, contempts of their authority, have judicial functions, and exercise this as incident to those which they possess, except only the House of Commons, whose authority in this respect rests upon ancient usage." From these views the tribunal proceeded to the result, that the lower house of the colonial legislature could not, as the House of Commons in England could, cause the arrest of a man, not a member, for insolent language spoken out of the house by him to the member, in a matter pertaining to the legislative conduct of the latter. Keilley *v.* Carson, 4 Moore P. C. 63, 83, 84, 88–90, followed in Fenton *v.* Hampton, 11 Moore P. C. 347. And see 4 Upper Canada Law Journal, 99. In a later case, on appeal from another of the colonies, the Privy Council held that a colonial legislature cannot even punish one of its members for a contempt committed in its presence. Doyle *v.* Falconer, Law Rep. 1 P. C. 328.

2. **The Reasoning.** — This reasoning and these principles seem to place the subject on a different foundation from what it occupies in my text; and, in fact, to permit the legislative body to go but little, if any, beyond the mere expelling from its halls of a person who interrupts its proceedings, and perhaps confining him if he cannot be otherwise kept from returning. Still, it may be doubtful whether the intent was not to accord greater power than this. But I submit, that the reasoning itself is essentially unsound. Though it is true that the English House of Commons derives its power to commit for contempt from immemorial usage, it is equally true that the judicial tribunals of the kingdom derive their power of the same sort from the same source. As a mat ter of natural reason, we know that a court of justice and a legislative body must alike be intrusted with the means to preserve order, else neither the one nor the other can do its business. But what means? This is a question on which men will differ; therefore the law steps in and points to "immemorial usage," and says, that the power which has been immemorially exercised shall be taken as the measure of the necessity. In other words, and to apply the proposition to the case in hand, the law says, that the power which the House of Commons has exercised in cases of contempts of its authority and the privi-

to legislative bodies; and, indeed, we cannot examine it in all its details as respects judicial tribunals. One leading idea[1] controls the whole subject; namely, that, the power to punish thus sum-

leges of its members, — conceded to be just on all hands, — from the beginning of things, is the law's measure of what is necessary and proper to be possessed by a legislative body similarly situated. The same reason, precisely, which makes the power of punishing for contempt, as immemorially exercised by the English judicial bodies sitting in their halls of justice, the measure of the like power which a colonial judicial tribunal may exercise, demands that the power thus exercised by the English legislative body, sitting in its legislative halls, shall be taken as the measure of the colonial legislature's power.

3. **Applied to our Legislatures.** — It does not, however, follow from this doctrine of the Privy Council, assuming it to be correct, that, when a colony separates herself from the mother country, and becomes independent, the principles of the common law do not then accord to the independent legislature the full rights of punishing for contempt exercised by the equally independent legislature of England. And surely it cannot be said, that, when a member of a legislative body, being obliged to be at times outside the legislative halls, is approached in any undue manner with respect to his doings within, there is not a high propriety requiring the body to protect him, and preserve the purity of legislative action by preserving unimpaired the immunities and freedom of the individual legislator.

4. **Separate Punishment by Court.** — It may be, that, in such a case, the courts will punish the offender; but mere punishment is not always what the emergency requires. Moreover, a legislative body should not be dependent upon the courts for its protection. Especially in our own country, where the executive, legislative, and judicial branches of our State and National governments are distinct and independent of one another, would it be a violation of correct legal principles — a violation, indeed, of law — for a court of justice to interfere to prevent a legislative body from protecting itself and its members, by its own power, against whatever disturbs its proceedings, or interferes with the freedom of a member in things pertaining to his legislative duties.

[1] Mr. Erskine once stated the doctrine thus: "Every court must have power to enforce its own process, and to vindicate contempts of its authority; otherwise the laws would be despised; and this obvious necessity at once produces and limits the process of attachment. Wherever any act is done by a court which the subject is bound to obey, obedience may be enforced, and disobedience punished, by that summary proceeding. Upon this principle, attachments issued against officers for contempt in not obeying the process of courts directed to them as ministerial servants of the law; and the parties on whom such process is served may, in like manner, be attached for disobedience. Many other cases might be put in which it is a legal proceeding, since every act which tends directly to frustrate the mandates of a court of justice is a contempt of its authority. But I may venture to lay down this distinct and absolute limitation of such process, namely, that it can only issue in cases where the court which issues it has awarded some process, given some judgment, made some legal order, or done some act which the party against whom it issues, or others on whom it is binding, have either neglected to obey, contumaciously refused to submit to, incited others to defeat by artifice or force, or treated with terms of contumely and disrespect [the last being] in the face of the court, or of its minister charged with the execution of its acts. [The limitation beginning with the words, "in the face of the court," must be understood to apply only to the next preceding clause, namely, "treated with terms of contumely," &c.; otherwise it directly conflicts with what the writer has said before, as well as with other established

marily being derived from necessity, the law of necessity fixes its bounds.

§ 251. **How Divided** — Therefore let us take a cursory look at judicial contempts in the following order: As committed, First, In the presence of the court; Secondly, In its absence, by persons attached to it as officers; Thirdly, In its absence, by persons attached to it as being parties or having had process served upon them; Fourthly, In its absence, by other persons; Fifthly, In these several ways, as against justices of the peace; Sixthly, In these several ways, as concerns the indictable quality of the act.

§ 252. First. *Contempts committed in the Presence of the Court:* — **General Doctrine.** — There is no exact rule to define these contempts; but any disorderly conduct calculated to interrupt the proceedings; any disrespect or insolent behavior toward the judge presiding; any breach of order, decency, decorum, either by parties and persons connected with the tribunal, or by strangers present; or, *a fortiori*, any assault made in view of the court, — is punishable in this summary way.[1]

Arrest of Exempt Person. — So is the arrest, in its presence, actual or constructive, of a party or witness, who, by reason of his attendance on the tribunal, is exempt from arrest.[2]

law.] But no crime, however enormous, even open treason and rebellion, which carry with them a contempt of all law, and of the authority of all courts, can possibly be considered as a contempt of any particular court, so as to be punishable by attachment, unless the act which is the object of that punishment be in direct violation or obstruction of something previously done by the court which issues it, and which the party attached was bound, by some antecedent proceedings, to make the rule of his conduct. A constructive extension of contempt, beyond the limits of this plain principle, would evidently involve every misdemeanor, and deprive the subject of the trial by jury in all cases where the punishment does not extend to touch his life." Letter to a member of the Irish Bar, A.D. 1785, 27 Howell St. Tr. 1019.

[1] 1 Gab. Crim. Law, 286; Reg. *v.* Rogers, 7 Mod. 28, 29; People *v.* Turner, 1 Cal. 152; Ex parte Summers, 5 Ire. 149; The State *v.* Yancy, 1 Car. Law Repos. 519; St. Clair *v.* Piatt, Wright, 532; Lowe *v.* The State, 9 Ohio, State, 337; 2 Hawk. P. C. Curw. ed. p. 221, § 35. **Insult to Judge.** — In Rex *v.* Davison, 4 B. & Ald. 329, 339, Holroyd, J., observed: "In the case of an insult to [the judge] himself, it is not on his own account that he commits; for that is a consideration which should never enter into his mind. But though he may despise the insult, it is a duty which he owes to the station to which he belongs not to suffer those things to pass which will make him despicable in the eyes of others. It is his duty to support the dignity of his station, and uphold the law, so that, in his presence at least, it shall not be infringed."

[2] Blight *v.* Fisher, Peters C. C. 41. See Rex *v.* Hall, 2 W. Bl. 1110. And this doctrine extends to the arrest of a witness *eundo, morando, et redeundo.* Kimpton *v.* London and Northwestern Railway, 25 Eng. L. & Eq. 557.

Mustering Soldiers. — And it is a contempt to muster a body of soldiers so near as to disturb the proceedings.[1]

What one has Right to do. — But no person is to be molested by the judge for doing respectfully, in the presence of the tribunal, any thing which he has the right to do.[2]

§ 253. **Other Illustrations — (Witness — Insufficient Return — Suit without Consent — Fictitious Suit — Papers from Court Files).** — If a witness refuses to be sworn,[3] or to answer a proper question;[4] or, if a person served with a *habeas corpus* declines to make a sufficient return thereon;[5] or, if one brings a suit in the name of another without his privity or consent;[6] or brings a mere fictitious suit, to obtain the opinion of the court on some point;[7] or, if any one takes papers from the files of the court and will not bring them back;[8] — in these and analogous instances, the offender is answerable for a contempt.

§ 254. Secondly. *Contempts by Officers of the Court, not in its Presence:* —

General Doctrine. — Officers of the court, in respect of their official conduct, are under its control, as well when absent as present.[9]

§ 255. **Attorney.** — Therefore an attorney or counsellor at law, guilty of any malpractice,[10] — as in refusing to give back to a client papers,[11] or pay over to him money collected,[12] or in wilfully mismanaging his business, — is liable, after proper proceedings had, to attachment for contempt. Of course, therefore, it is a contempt for an attorney to publish a libel on the court.[13] The

[1] The State *v.* Coulter, Wright, 421; The State *v.* Goff, Wright, 78. See Commonwealth *v.* Stuart, 2 Va. Cas. 320.

[2] Stokely *v.* Commonwealth, 1 Va. Cas. 330; Blight *v.* Fisher, Peters, C. C. 41. And see Martin *v.* Bold, 7 Taunt. 182.

[3] Stansbury *v.* Marks, 2 Dall. 213.

[4] Lott *v.* Burrel, 2 Mill, 167.

[5] The State *v.* Philpot, Dudley, Ga. 46. See Stockdale *v.* Hansard, 8 Dowl. P. C. 474.

[6] Butterworth *v.* Stagg, 2 Johns. Cas. 291.

[7] Smith *v.* Brown, 3 Texas, 360; Smith *v.* Junction Railway, 29 Ind. 546.

[8] Barker *v.* Wilford, Kirby, 232, 235. And see Keppele *v.* Williams, 1 Dall. 29.

[9] Sanders *v.* Metcalf, 1 Tenn. Ch. 419; Rex *v.* Wakefield, 1 Stra. 69. As to the constitutional question, see Harrison *v.* Chiles, 3 Litt. 194; Hollingsworth *v.* Duane, Wal. C. C. 77, 106; Floyd *v.* The State, 7 Texas, 215.

[10] Anonymous, 6 Mod. 137; 2 Hawk. P. C. Curw. ed. p. 210, § 6 et seq., p. 219, § 30.

[11] Ex parte Willand, 11 C. B. 544, 20 Eng. L. & Eq. 293.

[12] People *v.* Nevins, 1 Hill, N. Y. 154, 2 Hawk. P. C. Curw. ed. p. 211, § 10; Stevenson *v.* Power, 9 Price, 384; In re Newberry, 4 A. & E. 100; s. c nom. In re Newbury, 5 Nev. & M. 419.

[13] In re Moore, 63 N. C. 397.

punishment, in a proper case and after due proceedings, may extend to disbarring him.[1]

Sheriff. — The same rule applies to sheriffs and other like officers:[2] and a refusal by them to serve or return process,[3] or to pay money collected;[4] or an abuse in serving a precept,[5] or the making of a false return;[6] renders them liable.

Clerk — Master. — So is a clerk of the court[7] or a master in

[1] Post, § 270. Ex parte Robinson, 19 Wal. 505. **Disbarring.** — In this case, Field, J., delivering the opinion of the court, said: "This power is possessed by all courts which have authority to admit attorneys to practise. But the power can only be exercised where there has been such conduct on the part of the parties complained of as shows them to be unfit to be members of the profession. Parties are admitted to the profession only upon satisfactory evidence that they possess fair private character and sufficient legal learning to conduct causes in court for suitors. The order of admission is the judgment of the court that they possess the requisite qualifications both in character and learning. They become by such admission officers of the court." p. 512. I do not understand it to be absolutely settled, or this dictum of the learned judge to assert, that, in all cases, the power of the court to admit an attorney is essential to its power to disbar him. In reason, it would seem not to be. A legislative assembly that cannot elect a member may expel one. And if an officer of court is appointed otherwise than by its mandate, that does not preclude the court from controlling him; and it ought not, in extreme cases, from expelling him. In the Tennessee case of Smith *v.* The State, 1 Yerg. 228, it was held that the courts have power, without the intervention of a jury, to strike an attorney from the roll for improper conduct; and it is good cause that he accepted a challenge to fight a duel or fought one beyond the bounds of the State and killed his antagonist. As to the power, Catron, J., said: "Much inquiry has been made into the powers of the courts to remove attorneys. If the old statute of Hen. 4 had been examined, that which has been searched for, and found obscurely hinted at in so many authors, could have been found in a short paragraph; the statute first provides that all who are of good fame shall be put upon the roll, after examination of the justices, at their discretion, and after being sworn well and truly to serve in their offices: 'And if any such attorney be hereafter notoriously found in any default, of record *or otherwise*, he shall forswear the court, and never after be received to make any suit, in any court of the king. They that be good and virtuous, and of good fame, shall be received and sworn, at the discretion of the justices; and, if they are notoriously in default, at discretion may be removed upon evidence either of record or not of record.'" p. 229.

[2] See The State *v.* Williams, 2 Speers, 26.

[3] Chittenden *v.* Brady, Ga. Decis. 219; Ex parte Summers, 5 Ire. 149; People *v.* Marsh, 2 Cow. 493; People *v.* Adgate, 2 Cow. 504; Anonymous, 23 Wend. 102 (there is a statute in New York); Connor *v.* Archer, 1 Speers, 89; Pitman *v.* Clarke, 1 McMullan, 316; Rice *v.* McClintock, Dudley, S. C. 354; 2 Hawk. P. C. Curw. ed. p. 208, § 2; Howitt *v.* Rickaby, 9 M. & W. 52. See also Clark *v.* Foxcroft, 6 Greenl. 296, 301.

[4] Matter of Stephens, 1 Kelly, 584, Connor *v.* Archer, 1 Speers, 89; Thomas *v.* Aitken, Dudley, S. C. 292; 2 Hawk. P. C. Curw. ed. p. 209, § 4.

[5] The State *v.* Tipton, 1 Blackf. 166; Anonymous, 2 Keny. 372; Gregory *v.* Onslow, Lofft, 35; Rex *v.* Hall, 2 W. Bl. 1110; Hewitson *v.* Hunt, 8 Rich. 106; 2 Hawk. P. C. Curw. ed. p. 208, § 3.

[6] 2 Hawk. P. C. Curw. ed. p. 209, § 5.

[7] The State *v.* Simmons, 1 Pike, 265;

chancery[1] answerable in this way, for any wilful misfeasance or non-feasance.

Juror. — And if a juror, charged with a cause, leaves his associates and mingles with the community, or holds communication with persons outside,[2] he commits a contempt of court.[3]

§ 256. Thirdly. *Contempts in the Absence of the Court by Parties and Persons served with Process:* —

General Doctrine. — The relation of these persons to the tribunal is such, that any wilful disregard by them of its proper command is a contempt.

Illustrations — (Disobeying Injunction — Decree or Order — Award of Referees — Subpœna — Mandamus, &c.). — When, therefore, one disobeys an injunction,[4] or a decree to make a conveyance,[5] or an order to perform the award of referees,[6] or other similar command;[7] or a subpœna to appear as a witness,[8] or the like;[9] or when referees under a rule will not report;[10] or when the judge of an inferior tribunal refuses obedience to a process from a superior one;[11] or a private party declines to comply with

Moore *v.* Clerk of Jessamine, Litt. Sel. Cas. 104; Reg. *v.* Harland, 8 Dowl. P. C. 323.

[1] Yates *v.* Lansing, 9 Johns. 395, 4 Johns. 317, 6 Johns. 337.

[2] The State *v.* Helvenston, R. M. Charl. 48.

[3] See 2 Hawk. P. C. Curw. ed. p. 212, § 14 et seq.

[4] Gates *v.* McDaniel, 3 Port. 356; Woodworth *v.* Rogers, 3 Woodb. & M. 135; Finley *v.* Ankeny, Breese, 191; People *v.* Compton, 1 Duer, 512; Davis *v.* New York, 1 Duer, 451; Mead *v.* Norris, 21 Wis. 310; Howe *v.* Searing, 6 Bosw. 684; McCredie *v.* Senior, 4 Paige, 378; Hull *v.* Thomas, 3 Edw. Ch. 236.

[5] Buffum's Case, 13 N. H. 14; Hilliker *v.* Hathorne, 5 Bosw. 710.

[6] McClure *v.* Gulick, 2 Harrison, 340; Shriver *v.* The State, 9 Gill & J. 1; Yates *v.* Russell, 17 Johns. 461; Anonymous, Lofft, 451; Anonymous, Lofft, 321; Rex *v.* Myers, 1 T. R. 265; Mendell *v.* Tyrell, 9 M. & W. 217; McArthur *v.* Campbell, 4 Nev. & M. 208, 2 A. & E. 52; Bath *v.* Pinch, 4 Scott, 299.

[7] Hendrickson *v.* Hendrickson, 3 Harrison, 366; The State *v.* Noel, T. U. P. Charl. 43; Philips *v.* Harriss, 3 J. J Mar. 122; Gates *v.* McDaniel, 3 Port. 356; Ex parte Walker, 25 Ala. 81; Ex parte Langdon, 25 Vt. 680; Fisher *v.* Fisher, 4 Hen. & Munf. 484; Livingston *v.* Fitzgerald, 2 Barb. 396; Sherman *v.* Cohen, 2 Strob. 553; Kunckle *v.* Kunckle, 1 Dall. 364; Thicknesse *v.* Acton, 8 Eng. L. & Eq. 47, 15 Jur. 1052, 21 Law J. N. S. Ch. 215. The State *v.* Hungerford, 8 Wis. 345; People *v.* Church, 2 Wend. 262; Fulton *v.* Brunk, 18 Wend. 509.

[8] The State *v.* Trumbull, 1 Southard, 139; Delaney *v.* Regulators, 1 Yeates, 403; Commonwealth *v.* Deskins, 4 Leigh, 685.

[9] Jackson *v.* Justices, 1 Va. Cas. 314.

[10] Thompson *v.* Parker, 3 Johns. 260; Cumberland *v.* North Yarmouth, 4 Greenl. 459; Stafford *v.* Hesketh, 1 Wend. 71. See Frets *v.* Frets, 1 Cow. 335.

[11] People *v.* Judges of Washington, 2 Caines, 97; People *v.* Westchester Judges, 2 Johns. Cas. 118; The State *v.* Noel, T. U. P. Charl. 43; The State *v.* Hunt, Coxe, 287; Mungeam *v.* Wheatley, 1 Eng. L. & Eq. 516, 15 Jur. 110; Ex parte Carnochan, T. U. P. Charl. 315; People *v.* Pearson, 3 Scam. 270; Ex parte Wood-

a mandamus;[1] the delinquent is liable to an attachment for contempt. But the order, process, or decree must be a valid one, which the court has the authority to make; otherwise to disregard it is no contempt.[2]

§ 257. Fourthly. *Contempts in the Absence of the Court by other Persons:* —

Exceptional Doctrine. — It is held by some tribunals, that there can be no contempts of this sort; but, if a person is not an officer of the court, or served with its process, or a suitor in it, or in some way specially under its jurisdiction, what he does out of its presence is not punishable as a contempt. It is not denied that the English law is otherwise; but, for example, in Mississippi it appears to be deemed that the constitution and general spirit of the laws have abrogated so much of the common law as comes within our present subdivision. Therefore the court held, that the publication, during its sitting, of a newspaper article, reflecting on the conduct of the presiding judge, and charging him with being an abettor of a person against whom an indictment for murder was pending, could not be visited as a contempt.[3] And there may be other States in which a like doctrine prevails.[4]

§ 258. **General Doctrine.** — But the English and better American rule recognizes such contempts, though under limitations not easily defined. Thus, —

Abusing Judge out of Court. — In Virginia, where one interested in the event of a suit depending, but not a party, met the judge who was proceeding to take his seat on the bench; and, on being spoken to by him, responded, in substance, "I do not speak to any one who acted so corruptly and cowardly as to attack my character when I was absent and defenceless" (alluding to expressions made by the judge on the trial of the cause at a former term); this was held to be a contempt.[5]

Enticing away Witness. — If one procures a witness already

ruff, 4 Pike, 630; Patchin *v.* Brooklyn, 13 Wend. 664; Gorham *v.* Luckett, 6 B. Monr. 638. See Weaver *v.* Hamilton, 2 Jones, N. C. 343.

[1] Rex *v.* Edyvean, 3 T. R. 352; Rex *v.* Babb, 3 T. R. 579.

[2] Birdsall *v.* Pixley, 4 Wend. 196; People *v.* Brennan, 45 Barb. 344.

[3] Ex parte Hickey, 4 Sm. & M. 751.

[4] In Pennsylvania, there is a statute which substantially covers this ground. Foster *v.* Commonwealth, 8 Watts & S 77. See also In re Hirst, 9 Philad. 216. As to the United States, see post, § 260. See, also, Dunham *v.* The State, 6 Iowa, 245. As to Illinois, see Stuart *v.* People, 8 Scam. 395; People *v.* Wilson, 64 Ill. 195.

[5] Commonwealth *v.* Dandridge, 2 Va Cas. 408.

subpœnaed to absent himself from the trial in disobedience to the subpœna, this appears pretty plainly to be a contempt.[1]

Conduct toward Juror. — And where a jury had rendered a verdict of guilty against an indicted person, whereupon his brother proceeded to the foreman's house, accused the latter of having bullied the jury into the verdict, and challenged him to mortal combat, this was held to be a contempt of the court.[2] It is likewise a contempt to solicit a juror to give a signal, after the jury have retired, indicating whether or not they are likely to agree, and thereby enable an outside party more safely to bet on the question.[3]

§ 259. **Publications about Cause pending.** — Again, according to the general doctrine, any publication, whether by parties or strangers, relating to a cause in court, tending to prejudice the public as to its merits, and to corrupt or embarrass the administration of justice,[4] — or reflecting on the tribunal or its proceedings, or on the parties, the jurors, the witnesses, or the counsel,[5] — may be visited as a contempt.[6] And it makes no difference that the author of the article disclaims such a purpose, and that in fact it has not wrought out its natural results, if it has the evil tendency.[7] The facts usually show, that the publication was made in term time; and perhaps this ingredient may under some circumstances be material.[8] But, in general, it is only necessary, in point of law, that the cause should be pending.[9]

Publishing the Proceedings. — There are sometimes reasons why the proceedings in a cause should not be published, even accurately, or not published until the suit is terminated; then, if the judge makes an order forbidding or limiting the publication, in

[1] Burke *v.* The State, 47 Ind. 528; McConnell *v.* The State, 46 Ind. 298; Commonwealth *v.* Braynard, Thacher Crim. Cas. 146.

[2] Reg. *v.* Martin, 5 Cox C. C. 356.

[3] The State *v.* Doty, 3 Vroom, 403.

[4] Respublica *v.* Oswald, 1 Dall. 319; Bayard *v.* Passmore, 3 Yeates, 438; People *v.* Few, 2 Johns. 290; Respublica *v.* Passmore, 3 Yeates, 441; In re Cheltenham, &c. Railway, Law Rep. 8 Eq. 580; Daw *v.* Eley, Law Rep. 7 Eq. 49. In Rex *v.* Gilham, Moody & M. 165, the act was not sufficient.

[5] Hollingsworth *v.* Duane, Wal. C. C. 77, 102; Bronson's Case, 12 Johns. 460; People *v.* Freer, 1 Caines, 485, 518; Tenney's Case, 3 Fost. N. H. 162; Morrison *v.* Moat, 4 Edw. Ch. 25; Littler *v.* Thomson, 2 Beav. 129; In re Crawford, 13 Jur. 955.

[6] People *v.* Wilson, 64 Ill. 195; Reg. *v.* Onslow, Law Rep. 9 Q. B. 219, 12 Cox C. C. 358, 5 Eng. Rep. 443; Reg. *v.* Skipworth, Law Rep. 9 Q. B. 219, 230, 5 Eng. Rep. 456; s. c. Reg. *v.* Castro, Law Rep. 9 Q. B. 219; Reg. *v.* O'Dogherty, 5 Cox C. C. 348.

[7] People *v.* Wilson, supra.

[8] In re Sturoc, 48 N. H. 428.

[9] See post, § 262.

respect of time or otherwise, a violation of the order is a contempt.[1]

§ 260. **United States Statute — Publication of Proceedings, continued.** — A statute of the United States provides, that the courts of the United States shall have power "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority; provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of the said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."[2] And it has been held in one of the circuits, that, though the court is restrained from punishing, as for a contempt, the publication during trial of the testimony in a cause, yet, having the power to regulate the admission of persons within its own bar, and the proceedings there, it may exclude a reporter who comes to take minutes of testimony for such publication. And in the particular instance the court made the order, that no person should be admitted within the bar "for the purpose of reporting, except on condition of suspending all publication till after the trial is concluded."[3]

§ 261. **How, in Principle.** — Looking at this question of contempts committed by persons neither attached to the court nor in its presence, from the point of legal reason as distinguished from specific adjudication, we can discern no difference between those attached and those not, or between persons in the presence of the tribunal and persons absent, other than arises from the very different degrees of ability to obstruct the working of the judicial machinery possessed by individuals of these differing classes. Since the whole doctrine of contempt of court grows out of the necessity for it to administer justice, the consequence must be, that, whenever any obstruction to its justice is laid before it, the judge must cause the obstruction to be removed.

[1] 4 Bl. Com. 285; Matter of Clement, 33 Howell St. Tr. 1335, 1563, 1564; Rex *v.* Clement, 4 B. & Ald. 218. And see Morrison *v.* Moat, 4 Edw. Ch. 25.

[2] R. S. of U. S. § 725; Act of March 2, 1831, c. 99, 4 Stats. at Large, 487. As to which, and query whether it restrains the supreme court, see Ex parte Robinson, 19 Wal. 505.

[3] United States *v.* Holmes, 1 Wal. Jr 1, 11.

And though ordinarily men in no way connected with the tribunal, either as officers or parties, cannot obstruct the course of its justice without going into its presence, yet circumstances may and do occur in which they can. If they take advantage of these circumstances, and do what tends directly to impede the course of justice, or to corrupt the justice itself, they should be dealt with summarily for the contempt.[1]

§ 262. **Cause depending or not.** — These observations enable us to see the true rule for the court in relation to some things coming not exactly under the present or any preceding head of this chapter. For example, it has been held in chancery, that an attachment for contempt should not be granted when the bill is no longer pending.[2] But this cannot be a universal rule;[3] the question must be settled by the circumstances of the case. And it has accordingly been held, in a common-law court, that the termination of a cause in which a witness was summoned to give evidence, disobeying the summons, does not preclude the tribunal from afterward proceeding against the witness for the contempt. Said O'Neall, J.: The witness's "offence against the court consists in disobeying its process. The interest of the party to compel his attendance by attachment is ended; but the offence against the court still exists, and ought to be punished, so that witnesses may learn the duty of obedience."[4] On the other hand, the Massachusetts tribunal has denied to justices of the peace the power to proceed against a witness disobeying a subpœna, after the termination of the cause; but whether the same would be held of a court of record, and whether this decision does not turn entirely on statutes, the case does not inform us.[5] Plainly there are special circumstances in which this power should be exercised by a tribunal of justice after the cause is ended.[6]

§ 263. Fifthly. *Contempts against Justices of the Peace:* — **Distinguished from Superior Courts of Record.** — What has

[1] Suppose men should band together to offer bribes to the jurors when the court was not in session, or should send letters to unduly influence the judge, surely the court ought to have power to correct such conduct by the process for contempt.

[2] Robertson *v.* Bingley, 1 McCord Ch. 338, 349.

[3] Reg. *v.* O'Dogherty, 5 Cox C. C. 348.

[4] Johnson *v.* Wideman, Dudley, S. C. 70, 71.

[5] Clarke *v.* May, 2 Gray, 410. Also, Clarke's Case, 12 Cush. 320.

[6] See, also, on this general question, Williamson's Case, 2 Casey, 9; Weaver *v.* Hamilton, 2 Jones, N. C. 343; The Laurens, 1 Abb. Adm. 508.

been said thus far refers particularly to contempts against the higher courts of record. But there is an opinion, which may perhaps be well founded, that the authority of justices of the peace is somewhat more limited.[1] They may commit for contempts in their presence, while holding their court;[2] but Mr. Gabbett observes, that "courts of inferior jurisdiction cannot attach or commit a party for any contempt which does not arise in the face of the court."[3] And there are many expressions in the English books apparently sustaining this general proposition. Thus, though the present county courts are of record, and by the statute are permitted to commit only for contempts in court, still, being of inferior jurisdiction, it is strongly intimated that the same result would proceed from common-law principles.[4] It is also held, in England, that the sessions cannot proceed in this way against a man for disobeying an order of filiation, but only on his recognizance.[5] And we have some American dicta limiting the power of justices of the peace to contempts in court.[6] In reason, this power doubtless does not extend as far as that of the high tribunals, still there may be circumstances in which it should be permitted some scope beyond this narrowest limit.[7]

§ 264. Sixthly. *Contempts viewed as Indictable Offences:* —

Twofold Nature. — Many acts are both contempts of court and indictable crimes. Others, while analogous to contempts in their nature and tendencies, are indictable,[8] but no more. And, as we saw in the preceding volume[9] how the same thing may be equally a civil and a criminal injury, for which a civil suit and criminal prosecution may both be maintained; so here,

[1] 1 Gab. Crim. Law, 287.

[2] The State *v.* Johnson, 1 Brev. 155, 2 Bay, 385; Lining *v.* Bentham, 2 Bay, 1; The State *v.* Applegate, 2 McCord, 110; Rex *v.* Revel, 1 Stra. 420; Reg. *v.* Rogers, 7 Mod. 28; Reg. *v.* Langley, 2 Ld. Raym. 1029, 6 Mod. 124; ante, § 244.

[3] 1 Gab. Crim. Law, 287.

[4] Reg. *v.* Lefroy, Law Rep. 8 Q. B. 134.

[5] Reg. *v.* West, 11 Mod. 59.

[6] Lining *v.* Bentham, 2 Bay, 1, 8; Richmond *v.* Dayton, 10 Johns. 393; Hollingsworth *v.* Duane, Wal. C. C. 77; The State *v.* Applegate, 2 McCord, 110. None of these cases, except the last, contain any thing more than dicta on the point; and the last merely decides, that a justice of the peace cannot commit a constable for contempt in not returning an execution and paying over the money collected thereon. See also ante, § 262.

[7] Consult, also, on the general subject of this section, Ex parte Latimer, 47 Cal. 131; Winship *v.* People, 51 Ill. 296; Hill *v.* Crandall, 52 Ill. 70; Murphy *v.* Wilson, 46 Ind. 537; Richmond *v.* Dayton, 10 Johns. 393; The State *v.* Galloway, 5 Coldw. 326.

[8] See Reg. *v.* Gray, 10 Cox C. C. 184; The State *v.* Early, 3 Harring. Del. 562.

[9] Vol. I. § 264 et seq.

the indictment and the proceeding for contempt are entirely distinct, and neither will be a bar to the other.[1]

§ 265. **What Contempt of Justice of Peace Indictable — (Oral Words, &c.).** — "An indictment can be supported for a contempt of a justice of the peace, which, though short of a breach of the peace, yet amounts to an obstruction of the execution of his office;" because "every obstruction of an officer in the execution of his office is a public injury, and, unless where the legislature has directed otherwise, is indictable."[2] Even mere words may constitute the obstruction here meant;[3] the rule as to which is laid down in Starkie on Slander to be, that "any contemptuous or contumelious words, when spoken to the judges of any courts, in the execution of their office, are indictable."[4]

§ 266. **Whether all Contempts Indictable.** — The doctrine seems to have been supposed to be, that, in every instance where a magistrate may commit for contempt in consequence of what is done before him, the offender is liable likewise to this graver proceeding.[5] But, —

Insolence in Witness. — Lord Holt observed: "If a witness be insolent, we may commit him for the immediate contempt, or bind him to his good behavior; but we cannot indict him for it."[6]

Oral Abuse. — And where one was convicted on an indictment for saying to justices before whom he was brought by warrant at their sessions, "This is no justice of peace's business; you shall not try this matter; have a care what you do; I have blood in me, if I had you in another place," — judgment was arrested; because the words did not carry with them any intent to break the peace, especially as the defendant was a wheelwright;[7] still it is difficult to say, that even a wheelwright did not commit thereby a contempt of the justices. Even in a late Illinois case

[1] Vol. I. § 1067; The State *v.* Woodfin, 5 Ire. 199; The State *v.* Yancy, 1 Car. Law Repos. 519; Rex *v.* Ossulston, 2 Stra. 1107; The State *v.* Williams, 2 Speers, 26; Rex *v.* Pierson, Andr. 310. And see Vertner *v.* Martin, 10 Sm. & M. 103; Foster *v.* Commonwealth, 8 Watts. & S. 77; Ex parte Brounsall, Cowp. 829; In re King, 8 Q. B. 129; In re Wright, 1 Exch. 658; Reg. *v.* Martin, 5 Cox C. C. 356.

[2] Brooker *v.* Commonwealth, 12 S. & R. 175. And see Vol. I. § 465–468, 688.

[3] Rex *v.* Revel, 1 Stra. 420.

[4] 2 Stark. Slander, 194.

[5] Rex *v.* Revel, 1 Stra. 420.

[6] Reg. *v.* Rogers, 7 Mod. 28.

[7] Reg. *v.* Nun, 10 Mod. 186, 187

it was held that a man did, who said to the magistrate: "You can fine and be damned." [1]

Letter in name of Judge. — In another English case, the court was divided on the question whether a criminal information will lie against a person for writing, without authority, a letter in the name of the chief justice of the King's Bench, directed to one of the latter's friends, asking a visit from him.[2] Here was no contempt of court; and probably our judges would not hold such an act, however reprehensible, to be a crime.

Conclusion. — The result is, that, while most contempts of court are likewise indictable, there are some which are not.

§ 267. **United States Statute.** — A statute of the United States provides a punishment for "every person who corruptly, or by threats or force, endeavors to influence, intimidate, or impede any witness, or officer in any court of the United States, in the discharge of his duty; or corruptly, or by threats or force, obstructs or impedes, or endeavors to obstruct or impede, the due administration of justice therein." [3] And the reader perceives, that this statute is, in substance, simply an affirmance of what, in the States, would be generally deemed to be the common-law doctrine, which is thus made of force in the tribunals of the United States.

III. *The Consequences of the Contempt.*

§ 268. **Only Court offended to punish.** — It is not within the plan of this volume to discuss questions of practice; yet it may be observed, that the very nature of a contempt compels the court against which it is committed to proceed against it, and, if the court has jurisdiction, precludes any other or superior tribunal from taking cognizance of it, whether directly or on appeal or otherwise.[4]

[1] Hill *v.* Crandall, 52 Ill. 70.

[2] Rex *v.* Emerton, 2 Show. 20.

[3] R. S. of U. S. § 5399; Act of March 2, 1831, c. 99, 4 U. S. Stats. at Large, 488.

[4] Crosby's Case, 3 Wils. 188; Gates *v.* McDaniel, 4 Stew. & P. 69; Moore *v.* Clerk of Jessamine, Litt. Sel. Cas. 104; The State *v.* Tipton, 1 Blackf. 166; People *v.* Nevins, 1 Hill, N. Y. 154; Rex *v.* Flower, 8 T. R. 314, 27 Howell St. Tr. 986; Yates *v.* Lansing, 9 Johns. 395, 4 Johns. 317, 366; Ex parte Adams, 25 Missis. 883; Floyd *v.* The State, 7 Texas, 215; Ex parte Kearney, 7 Wheat. 38, 43; Clark *v.* People, 1 Breese, 266; The State *v.* White, T. U. P. Charl. 123; Ex parte Summers, 5 Ire. 149; Johnston *v.* Com-

Exceptional Appeals. — Under peculiar provisions of law, however, in some of the States, and the pressure of modern opinions, the superior courts do in a measure, not fully, correct errors of the inferior ones in this matter.[1]

§ 269. **Proceed Summarily.** — The proceeding is in all cases summary, before the judge, without the intervention of a jury.[2]

Jury. — The trial without jury is, in this country, no violation of constitutional rights.[3]

Offence against the State — How entitled. — The offence of contempt of court is against the State, not the judge, or the party in the cause. Therefore the proceeding should properly be entitled as of "The State" against the one in contempt.[4]

monwealth, 1 Bibb, 598; Lockwood *v.* The State, 1 Ind. 161; Ex parte Tillinghast, 4 Pet. 108; May Parl. Law, 2d ed. 70, 73; Penn *v.* Messenger, 1 Yeates, 2; Ex parte Chamberlain, 4 Cow. 49; Vilas *v.* Burton, 27 Vt. 56; Jordan *v.* The State, 14 Texas, 436; The State *v.* Mott, 4 Jones, N. C. 449; Matter of Cohen, 5 Cal. 494; In re Cooper, 32 Vt. 253; Crow *v.* The State, 24 Texas, 12; Ex parte Maulsby, 13 Md. 625; The State *v.* Towle, 42 N. H. 540; The State *v.* Galloway, 5 Coldw. 326.

[1] Stuart *v.* People, 3 Scam. 395; Stokeley *v.* Commonwealth, 1 Va. Cas. 330; Shannon *v.* The State, 18 Wis. 604; Whittem *v.* The State, 36 Ind. 196; Romeyn *v.* Caplis, 17 Mich. 449. In Kentucky the appellate court, it seems, will correct an erroneous sentence, as where the punishment is greater than the law warrants; but will not retry the question of contempt. Bickley *v.* Commonwealth, 2 J. J. Mar. 572, 575. See also Patton *v.* Harris, 15 B. Monr. 607; Turner *v.* Commonwealth, 2 Met. Ky. 619. In the case of Bickley *v.* Commonwealth, Underwood, J., observed: "We conceive, in cases of contempt, the appellate court has authority to correct erroneous judgments and sentences, although it cannot retry the question of contempt or no contempt. Suppose, for instance, a circuit court should inflict a fine of $500 for a contempt, without the intervention of a jury, when the statute limits the fine to ten pounds; might not this court rectify the error? We see no objection to doing it." So in a North Carolina case, Ex parte Summers, 5 Ire. 149, Ruffin, C. J., intimated, that, if the inferior court sets out in its order of commitment the facts constituting the contempt, and these facts are not sufficient, the superior tribunal may discharge the party on habeas corpus. It was held, however, that the inferior court need not state the facts in its order of commitment, which is good without. See also Hummell's Case, 9 Watts, 416; Adams *v.* Haskell, 6 Cal. 316; People *v.* O'Neil, 47 Cal. 109; People *v.* Sturtevant, 5 Seld. 263; People *v.* New York, 29 Barb. 622; People *v.* Cassels, 5 Hill, N. Y. 164; Cabot *v.* Yarborough, 27 Ga. 476; Jordan *v.* The State, 14 Texas, 436; The State *v.* Sheriff, 1 Mill, 145; Baltimore and Ohio Railroad *v.* Wheeling, 13 Grat. 40; Clarke *v.* May, 2 Gray, 410; Williamson's Case, 2 Casey, 9; Commonwealth *v.* Newton, 1 Grant, Pa. 453; Ex parte Pater, 9 Cox C. C. 544. Perhaps some of the doctrines of these cases may find favor everywhere.

[2] 4 Bl. Com. 283 et seq.; McConnell *v.* The State, 46 Ind. 298; Whittem *v.* The State, 36 Ind. 196; Crow *v.* The State, 24 Texas, 12.

[3] The State *v.* Doty, 3 Vroom, 403; Neel *v.* The State, 4 Eng. 259.

[4] Haight *v.* Lucia, 36 Wis. 355; Bowery Savings Bank *v.* Richards, 6 Thomp. & C. 59, 3 Hun, 366; Ex parte Kearney, 7 Wheat. 38; In re Mullee, 7 Blatch. 23.

Purging Contempt. — The defendant has the privilege of purging his contempt, if he can, on interrogatories put to him.[1] If he declares that nothing improper was intended, and that he acted in good faith, the declaration is in many instances sufficient.[2] But it is not sufficient always:[3] especially where a private right is to be enforced, the party interested cannot be defeated in this way.[4]

§ 270. **How Punished.** — The punishment — if that may be called such which is rather a mere consequence — is usually fine or imprisonment or both, at the discretion of the judge.[5]

Removal from Office — Attorney. — And there is sometimes added to this, or substituted for it, in the case of an attorney or other officer, a removal or suspension from his office.[6] But if an attorney is struck from the rolls of one court, he is not necessarily barred admission to practise in another.[7]

Bail. — A commitment for contempt is in execution, in distinction from *mesne* process, and no bail is therefore allowable.[8]

Stay of Proceedings in Main Cause. — Also when it is against a party in a cause which is pending, and concerns his conduct therein, he will sometimes be deemed disqualified to proceed in

Crook *v.* People, 16 Ill. 534; The State *v.* Sauvinet, 24 La. An. 119; Whittem *v.* The State, 36 Ind. 196.

[1] 4 Bl. Com. 287; The State *v.* Coulter, Wright, 421; The State *v.* Goff, Wright, 78; Coulson *v.* Graham, 2 Chit. 57; Rex *v.* Wheeler, 1 W. Bl. 311; Rex *v.* Morley, 4 A. & E. 849; Matter of Pitman, 1 Curt. C. C. 186; Crow *v.* The State, 24 Texas, 12; The State *v.* Earl, 41 Ind. 464; Burke *v.* The State, 47 Ind. 528.

[2] People *v.* Few, 2 Johns. 290; St. Clair *v.* Piatt, Wright, 532. And see The State *v.* Trumbull, 1 Southard, 139; Ex parte Beebees, 2 Wal. Jr. 127; Ex parte Woodruff, 4 Pike, 630; Clare *v.* Blakesley, 1 Scott N. R. 397; United States *v.* Dodge, 2 Gallis. 313; Hollingsworth *v.* Duane, Wal. C. C. 77.

[3] People *v.* Freer, 1 Caines, 485, 518; United States *v.* Coolidge, 2 Gallis. 364.

[4] Buffum's Case, 13 N. H. 14; Mungeam *v.* Wheatly, 1 Eng. L. & Eq. 516, 15 Jur. 110; People *v.* Compton, 1 Duer, 512; The State *v.* Simmons, 1 Pike, 265; Anonymous, Lofft, 451. And see McClure *v.* Gulick, 2 Harrison, 340; Ex parte Chamberlain, 4 Cow. 49.

[5] 4 Bl. Com. 287. Blackstone adds, "and sometimes by a corporal or infamous punishment;" ib. And see People *v.* Bennett, 4 Paige, 282.

[6] Ante, § 255; Smith *v.* Matham, 4 D. & R. 738; The State *v.* Williams, 2 Speers, 26; Stephens *v.* Hill, 10 M. & W. 28; Kimpton *v.* Eve, 2 Ves. & B 349. And see Commonwealth *v.* Barry, Hardin, 237. See People *v.* Turner, 1 Cal. 188.

[7] Ex parte Tillinghast, 4 Pet. 108. See In re Smith, 4 Moore, 319, 1 Brod. & B. 522; Ex parte Yates, 9 Bing. 455; Anonymous, 1 Exch. 453; In re Wright, 5 Dowl. & L. 394.

[8] Ex parte Kearney, 7 Wheat. 38, 43; Farrell's Case, Andr. 298; Phelips *v.* Barrett, 4 Price, 23. A person may be attached for contempt before he is committed; and, until committed, he may have bail. 4 Bl. Com. 287. See People *v.* Bennett, 4 Paige, 282.

it until he purges his contempt,[1] — a matter, however, which appears to be regulated by the practice of the particular tribunal. This disability to proceed in the cause is not mentioned in the judgment of contempt, but flows from it as a legal consequence.

§ 271. **How escape from Punishment.** — When the proceeding is to enforce an order to do a particular thing, the only escape for the defendant from perpetual imprisonment is, usually, to comply.[2]

§ 272. **How far Attachment for Contempt discretionary.** — A judge is not obliged to notice every act which may be construed into a contempt; and so the granting of an attachment is, in many cases, matter of discretion with him.[3] There are circumstances, however, such as where private rights are concerned, in which he has no discretion.[4]

§ 273. **Where there is another Remedy.** — Where the law has provided some other and sufficient remedy, the court may see in this a reason why it should be resorted to, rather than this summary process, which will, therefore, be refused. Thus, —

Testify before Grand Jury. — A statute having provided, that, if a witness summoned before the grand jury to give evidence of violations of the laws against gaming, "fail or refuse to attend and testify, . . . he shall be liable to indictment," — the Alabama tribunal would not proceed against a delinquent for contempt, observing: "At the common law, it was clearly competent for the court to treat as a contempt the refusal of a witness to give evidence to a grand jury;[5] but, in a case coming within the statute we are considering, the perverseness of the witness is made an offence against criminal justice, punishable under an indictment, and the punishment denounced may be more efficacious for the correction of the evil."[6]

[1] Johnson *v.* Pinney, 1 Paige, 646; Lane *v.* Ellzey, 4 Hen. & M. 504; Attorney-General *v.* Shield, 11 Beav. 441; Newton *v.* Ricketts, 11 Beav. 67; Chuck *v.* Cremer, 1 Cooper temp. Cotten. 205, 247; Green *v.* Green, 1 Cooper temp. Cotten. 206, note; Morrison *v.* Morrison, 4 Hare, 590; Madden *v.* Woods, 7 Ir. Eq. 637; Crawforth *v.* Holder, 3 Y. & Col. Ex. 718; Plumbe *v.* Plumbe, 3 Y. & Col. Ex. 622; Wilson *v.* Bates, 9 Sim. 54; Jeyes *v.* Foreman, 6 Sim. 384; Wallis *v.* Talmadge, 10 Paige, 443; Rogers *v.* Patterson, 4 Paige, 450; Fisher *v.* Fisher, 4 Hen. & M. 484.

[2] Gorham *v.* Luckett, 6 B. Monr. 638; Barlee *v.* Barlee, 1 Add. Ec. 301.

[3] People *v.* Few, 2 Johns. 290; The State *v.* Nixon, Wright, 763.

[4] Ex parte Chamberlain, 4 Cow. 49; ante, § 269.

[5] See Stat. Crimes, § 137.

[6] The State *v.* Blocker, 14 Ala. 450 And see Ward *v.* The State, 2 Missc. 120; Harrington *v.* Jennings, Lofft, 188.

Required by Justice. — Yet neither a statutory provision,[1] nor one of the common law, for the punishment of an act, will prevent the court from treating the same as a contempt, if thereby the ends of justice may be best promoted. In short, this proceeding by attachment is a flexible one; and it should be used only under the sound discretion of the judge, for the promotion of good ends.

[1] The State *v.* Williams, 2 Speers, 26.

CHAPTER XIII.

COUNTERFEITING AND THE LIKE AS TO COIN [1]

§ 274, 275. Introduction.
276–279. Views of the English Law.
280–282. Laws of United States.
283–287. State Laws.
288–298. Meaning of some Words.
299, 300. Remaining and Connected Questions.

§ 274. **Scope of this Chapter.** — The offence of counterfeiting the coin is, in a certain sense, a branch of the broader one of Forgery, to be treated of further on. For a full view of it, that chapter must be examined in connection with this. It is proposed here, in a fragmentary chapter, to consider what is special to the coin.

§ 275. **How the Chapter divided.** — The following will be the order: I. Views of the English Law; II. Laws of the United States; III. State Laws; IV. Meaning of some Words in the Law of Counterfeiting; V. Remaining and Connected Questions.

I. *Views of the English Law.*

§ 276. **Coin.** — "Coin is a word collective, which contains in it all manner of the several stamps and species of money in any kingdom; and this is one of the royal prerogatives belonging to every sovereign prince, that he alone in his own dominions may order and dispose the quantity, value, and fashion of his coin.

Foreign Coin. — "But the coin of one king is not current in the kingdom of another, unless it be at great loss; though our king, by his prerogative, may make any foreign coin lawful money of England, at his pleasure, by proclamation." [2]

[1] For matter relating to this title, see Vol. I. § 178, 179, 204, 359, 435, 479, 686, 765, 769, 799, 989. See this volume, FORGERY. For the pleading, practice, and evidence, see Crim. Proced. II. § 246 et seq. And see Stat. Crimes, § 211, 214, 225, 306–309.

[2] Tomlins Law Dict. Coin; referring to Termes de Ley.

§ 277. **Power of Crown as to Coin.** — In England, therefore, the coining of money, the legitimation of foreign coin, the giving of value to coin foreign and domestic, and the crying down of coin in circulation so as to prevent its being longer current, are branches of the ancient prerogative of the Crown. "And this prerogative has been considered," says Gabbett, "to extend, not only to the enhancing of the coin in respect of its extrinsic value or denomination, but to the debasing of it in regard of its intrinsic value or measure of alloy. Great doubts have, however, been entertained, whether, by force of the several statutes which settle the standard of the gold and silver coin of the realm, the king is not in effect restrained from altering it, or increasing the alloy; and such an exercise of the prerogative is not any longer to be apprehended, for, as Lord Hale observes, it would be a dishonor to the nation to put in practice this prerogative of imbasing or debasing the coin, and not safe to be attempted without the assent of Parliament."[1]

§ 278. **Of what Metal.** — Anciently the coin of the realm was only of gold and silver, alloyed with a certain proportion of copper, constituting what is called sterling, or its legal standard; but in 1672[2] a copper coin was added.

§ 279. **Nature and Grade of Offence of Counterfeiting.** — From this relation of the Crown to the coin, the doctrine of the English courts became established from the earliest times, that the counterfeiting of the king's coin was treason;[3] though the counterfeiting of foreign money, made current by his proclamation, was punishable merely as a misdemeanor.[4] But Stat. 1 Mary, sess. 2, c. 6, made the latter treason likewise.[5] At present, in England, the principal offences against the coin are felony; though there are, connected with them, some misdemeanors.[6]

[1] 1 Gab. Crim. Law, 219. And for a great deal of interesting matter concerning the coin, see 1 Hale P. C. 188 et seq.; Case of Mixed Money, 2 Howell St. Tr. 113.

[2] 1 Hale P. C. 195.

[3] See 1 Hale P. C. 192, 215, 219; Case of Mixed Money, 2 Howell St. Tr. 113, 116; Case of Mines, Plow. 310, 316.

[4] 1 Hale P. C. 210; Hammond on Coining, parl. ed. 3, pl. 3.

[5] 1 Hale P. C. 192, 210, 215, 216.

[6] Stat. 24 & 25 Vict. c. 99, entitled "An Act to consolidate and amend the Statute Law of the United Kingdom against Offences relating to the Coin."

II. *Laws of the United States.*

§ 280. **How under the Constitution.** — By provisions in the Constitution of the United States, Congress has the power "to coin money, regulate the value thereof, and of foreign coin," and "to provide for the punishment of counterfeiting the securities and current coin of the United States."[1] No State shall "coin money," or "make any thing but gold and silver coin a tender in payment of debts."[2]

§ 281. **Statutes — Common Law.** — But according to the doctrine laid down in the preceding volume, concerning the common law as a national system, there can be no common-law offences, against the United States,[3] relating to its coin. Congress has therefore made, on this subject, such statutory provisions as seemed desirable.[4]

§ 282. **Importation of Counterfeit Coin — Constitutional.** — The reader has observed, that the express words of the Constitution empower Congress "to provide for the punishment of *counterfeiting*," only. Still the statutes have included also, in their prohibitions, the importation into this country from abroad of counterfeit coin, and the uttering of such coin here. And this branch of our statutory law has been held to be constitutional; because, in the language of Daniel, J., "the power to coin money being given to Congress, founded on public necessity, it must carry with it the correlative power of protecting the creature and object of that power."[5]

III. *State Laws.*

§ 283. **General Doctrine.** — The reader has observed, that the Constitution of the United States gives to Congress the power over the coin, and withholds it from the State legislatures.[6] But the effect of this provision is not to deprive the States of all jurisdiction over the class of offences we are considering in this chapter.

[1] Const. U. S. art. 1, § 8.
[2] Const. U. S. art. 1, § 10.
[3] Vol. I § 190 et seq.
[4] See, for the principal provisions, R. S. of U. S. § 5457–5462; Act of 1875, c. 143, § 4.
[5] United States *v.* Marigold, 9 How U. S. 560, 567.
[6] Ante, § 280.

§ 284. **Common Law of States.** — At the period when our forefathers brought to this country so much of the English law, common and statutory, as was applicable to our situation and circumstances, counterfeiting the coin and kindred offences were statutory treasons in our fatherland.[1] With us they cannot, for reasons already explained,[2] be of a grade higher than felony; even if, since the adoption of the United States Constitution, they are common-law offences in the States as against the State governments. Waiving the question, then, whether in the States they have ceased to be indictable at the common law, we shall proceed on the assumption that they have; because, if they have not, still the reader will find them sufficiently treated of in the older English books of the criminal law. And there is room for grave doubts, whether the effect of the United States Constitution was not to abrogate entirely this branch of the unwritten law of the individual States.[3]

§ 285. **Power of States.** — Whether the States have power, by legislation, to punish any offences against the coin of the United States, has, till recently, been a question of doubt. But at length it is settled that they have;[4] for, as the citizen owes a double allegiance, to the government of his own State and to the General Government, the same wrongful act may be in its nature injurious to both.[5] And it should be borne in mind, that the statutes of the United States, for the punishment of counterfeiting the coin, and the like, contain the provision, that nothing in them "shall be construed to deprive the courts of the individual States of jurisdiction, under the laws of the several States, over offences made punishable by" them.[6] But the particular act of counterfeiting, as distinguished from the cheat effected or attempted on the public or individuals, — that is, the act of counterfeiting in the aspect in which it was treason in England, — is evidently, as

[1] Ante, § 279; Vol. I. § 479; 1 Hale P. C. 188, 225.

[2] Vol. I. § 177, 456, 611, 612.

[3] And see post, § 404–407.

[4] Vol. I. § 178, 987. The State *v.* McPherson, 9 Iowa, 53, 55; Sizemore *v.* The State, 3 Head, 26.

[5] And see the observations of Grier, J., in Moore *v.* Illinois, 14 How. U. S. 13, 20; Snoddy *v.* Howard, 51 Ind. 411.

[6] Stats. April 21, 1806, c. 49, § 4, 2 U. S. Stats. at Large, 405; March 3, 1825, c. 65, § 26, 4 Ib. 122. And see Vol. I. § 172 et seq. The Revised Statutes, in lieu of the words in the text, have the general provision, introductory to the title "Crimes," that "nothing in this title shall be held to take away or impair the jurisdiction of the courts of the several States under the laws thereof." R. S. of U. S. § 5328.

intimated in the last section, no offence against the sovereignty of an individual State.

§ 286. **Counterfeit as False Token.** — Yet a piece of counterfeit coin is a false token;[1] therefore the fraudulent passing of it for value, by one who knows it to be counterfeit, is an indictable cheat at the common law.[2]

Procuring and Uttering as Attempt to Cheat. — And to procure base coin, with the intent to utter it as good;[3] or tools for making such coin, with the intent to use them;[4] is in like manner an indictable common-law attempt to cheat.[5] There is an English case, in which the allegation of "unlawfully uttering and tendering in payment to J. H. ten counterfeit halfpence, knowing them to be counterfeit," was held insufficient to sustain a conviction; "it not being," says Mr. East, "an indictable offence."[6] Yet we shall find it difficult to uphold this decision, unless on the ground that copper coins are tokens too small to be noticed by the criminal law, according to a doctrine discussed in the preceding volume.[7]

§ 287. **Same in our States.** — No reason appears why these misdemeanors, of cheating and attempting to cheat by false coin and the like, should not be deemed such under the common law of the States.

Counterfeiting. — Perhaps also, in the States, the counterfeiting of the coin of the United States may be an indictable common-law attempt to cheat the people of the State. The question is of little practical importance; for, in probably all the States, statutes have made every offence against the coin indictable as well under them as under the acts of Congress.[8] That this should be so was contemplated by Congress, as we have already seen.[9]

[1] See ante, § 148.

[2] 1 Hale P. C. 214.

[3] Rex *v.* Fuller, Russ. & Ry. 308; Reg. *v.* Fulton, Jebb, 48.

[4] Rex *v.* Sutton, 1 East P. C. 172, 2 Stra. 1074, Cas. temp. Hardw. 370. And see the distinctions stated Vol. I. § 204.

[5] Ante, § 168.

[6] Cirwan's Case, 1 East P. C. 182. See, on the entire matter of this section, Hammond on Coining, parl. ed. 45 et seq.

[7] Vol. I. § 212 et seq.

[8] It was assumed by Grier, J., in Moore *v.* Illinois, 14 How. U. S. 13, 20, that a conviction in the tribunals of one of these sovereignties will be no bar to proceedings in the other. But this point has not been adjudged; and it is by no means certain. See Vol. I. § 985–989.

[9] Ante, § 285.

IV. *Meaning of some Words in the Law of Counterfeiting.*

§ 288. **General View.** — The laws relating to the coin being so many and diverse, we can profitably do but little more, in further discussing them, than simply direct attention to the legal meanings of various words and phrases. In the work on Statutory Crimes the author explained the terms, *utter*,[1] *put off*,[2] *pass*,[3] *tool*,[4] *mould or die*,[5] *ten similar pieces of counterfeit gold or silver coin*.[6]

§ 289. **Counterfeit — Counterfeiting.** — Lord Hale observes, that "money consists principally of three parts: 1. The material whereof it is made; 2. The denomination or extrinsic value; 3. The impression or stamp."[7] This view will help us understand what is a counterfeiting of coin. It is the making of false or spurious coin, to imitate — or, as the phrase commonly is, in the similitude of — the genuine.[8]

§ 290. **How much must be done.** — In this definition may be noticed, first, the making. Unless the coin is so far finished as to be capable of being used for purposes of fraud, it is not made.[9] But there need be no uttering, for the offence is complete when the coin is ready to be uttered.[10] Secondly, it must be base or spurious, — a point which needs no illustration.

§ 291. **Similitude.** — Thirdly, it must have a resemblance to the genuine. Whether it possesses this requisite is a question of fact for the jury;[11] but the court will instruct them, that the likeness need not be perfect. If the counterfeit looks so much

[1] Stat. Crimes, § 306.

[2] Stat. Crimes, § 307. "Uttered and put off," Reg. *v.* Welch, 1 Eng. L. & Eq. 588, 2 Den. C. C. 78, Temp. & M. 409, 15 Jur. 136.

[3] Stat. Crimes, § 308. The State *v.* Beeler, 1 Brev. 482.

[4] Stat. Crimes, § 319; Rex *v.* Lennard, 2 W. Bl. 807, 1 Leach, 4th ed. 90, 1 East P. C. 170; The State *v.* Bowman, 6 Vt. 594; Commonwealth *v.* Kent, 6 Met. 221; Rex *v.* Bell, 1 East P. C. 169.

[5] Stat. Crimes, § 211.

[6] Stat. Crimes, § 214; Brown *v.* Commonwealth, 8 Mass. 59, 71. And see Reg. *v.* Williams, Car. & M. 259; Commonwealth *v.* Griffin, 21 Pick. 523; Commonwealth *v.* Cone, 2 Mass. 132; Commonwealth *v.* Whitmarsh, 4 Pick. 233; Commonwealth *v.* Houghton, 8 Mass. 107. And see Stat. Crimes, § 225.

[7] 1 Hale P. C. 188.

[8] Daniel, J., in United States *v.* Marigold, 9 How. U. S. 560, 568, observes: "The term counterfeit, both by its etymology and common intendment, signifies the fabrication of a false image or representation." And see Reg. *v.* Hermann, 4 Q. B. D. 284.

[9] Rex *v.* Varley, 1 Leach, 4th ed. 76, 2 W. Bl. 682, 1 East P. C. 164; Reg. *v.* Bradford, 2 Crawf. & Dix C. C. 41. And see Stat. Crimes, § 225.

[10] 1 East P. C. 165.

[11] 1 East P. C. 163; Rex *v.* Welsh, 1 East P. C. 87, 164, 1 Leach, 4th ed. 364.

like the original, that it might deceive a person using ordinary caution, — the doctrine has been so laid down, — it will suffice.[1] "Thus," says Mr. East, "a counterfeiting, with some small variation in the inscription, effigies, or arms, done probably with intent to evade the law, is yet within it; and so is the counterfeiting in a different metal, if in appearance it be made to resemble the true coin."[2] There need be no impression on the counterfeit; for it may be in the likeness of the worn coin.[3]

§ 292. **Coloring.** — This word is found in the English statute of 8 & 9 Will. 3, c. 26, § 4.[4] And it has been held, that preparing blanks with such materials as, when rubbed (before they were rubbed they looked like lead), will make them resemble the real coin, is a coloring, even before the resemblance has been produced by the friction.[5] So, bringing to the surface the latent silver in a blank of mixed metal, by dipping it in aqua-fortis which corrodes the base metal, is a coloring within this statute.[6]

§ 293. **Milled Money.** — Says Mr. East:[7] "As to what shall be considered as milled money within the statute of William, James Bunning was indicted for putting off to J. P. nine pieces of false and counterfeit *milled* money and coin, each counterfeited to the likeness of a piece of legal and current milled money and silver coin of the realm, called a shilling, at a lower rate and value than the same did by the denomination import and were counterfeited for, *i. e.* at so much, &c. The fact of knowingly

[1] United States *v.* Morrow, 4 Wash. C. C. 733; Rex *v.* Elliot, 1 Leach, 4th ed. 175, 179; s. c. nom. Rex *v.* Elliott, 2 East P. C. 951; Rex *v.* Varley, 1 East P. C. 164, 1 Leach, 4th ed. 76, 2 W. Bl. 682; Rasnick *v.* Commonwealth, 2 Va. Cas. 356; Reg. *v.* Robinson, Leigh & C. 604, 10 Cox C. C 107. And see Rex *v.* Collicott, Russ. & Ry. 212, 4 Taunt. 300, 2 Leach, 4th ed. 1048; Rex *v.* Ridgeley, 1 East P. C. 171; Commonwealth *v.* Kent, 6 Met. 221; United States *v.* Burns, 5 McLean, 23.

[2] 1 East P. C. 164.

[3] Rex *v.* Welsh, 1 East P. C. 87, 164, 1 Leach, 4th ed. 364; Rex *v.* Wilson, 1 Leach, 4th ed. 285. See People *v.* Osmer, 4 Parker C. C. 242. The doctrine which demands a resemblance to the genuine coin seems not to be of a sort applicable alone in the law of counterfeiting and forgery. If what is done for the purpose of accomplishing any fraud, or any other wrongful end, has no tendency, either apparent or real, to accomplish the thing meant, there is no such concurrence of act with intent as is required to constitute crime. The reader will see this general proposition in several different relations in the first volume. And see particularly, Vol. I. § 204 et seq., 430 et seq., 738–752.

[4] Also among the more verbose provisions of the present statute, 24 & 25 Vict. c. 99, § 3.

[5] Rex *v.* Case, 1 East P. C. 165, 1 Leach, 4th ed. 154, note.

[6] Rex *v.* Lavey, 1 East P. C. 166, 1 Leach, 4th ed. 153. And see Rex *v.* Harris, 1 Leach, 4th ed. 135.

[7] 1 East P. C. 180.

putting off counterfeit shillings at a lower value than according to their denomination was fully proved; but it could not be proved that the money had any marks of *milling* upon it. The prisoner being convicted, the objection was referred to the judges, who all held the conviction right. Milled money is so called to distinguish it from hammered money; and all the money now current is milled, *i. e.* passed through a mill or press to make the plate, out of which it is cut, of a proper thickness; though by a vulgar error it is frequently supposed to mean the marking on the edges, which is properly termed *graining*. The judges, therefore, thought it unnecessary that the counterfeit money should appear to have been milled; for, considering *milled-money* as one word (as if written with a hyphen), and descriptive of the money now current, if the counterfeit resemble the money which, if genuine, would have been milled, it is enough."[1]

§ 294. **Instrument adapted for Coining.** — A statute[2] made it an offence knowingly[3] to possess, with a specified intent, any instrument adapted and designed for making counterfeit coin; and one was held to be punishable who, with the intent, had an instrument to make one side only of the coin. "Adapted for coining," it was observed, "is matter of description, and applies to any instrument which may be used in the formation of any part of a coin."[4]

Puncheon. — The like may be said of a "puncheon:" and, in England, though it have not the letters, it is sufficiently described in an indictment as a puncheon which will impress the head side of a shilling.[5]

§ 295. **Coin at the Time Current.** — Under the Missouri statute, art. 4, § 7, against counterfeiting "any gold or silver coin at the time current in this State by law or usage," the genuine coin must be current when the counterfeit is made: the offence not being committed if it has gone out of circulation then. But under § 21, whereby the passing of such counterfeit coin is equally criminal with the counterfeiting, there is no need

[1] Rex *v.* Bunning, 1 East P. C. 180, 2 Leach, 4th ed. 621; Dorrington's Case, 1 East P. C. 181; Jacob's Case, 1 East P. C. 181.

[2] R. S. of Mass. c. 127, § 18.

[3] See Sasser *v.* The State, 13 Ohio, 453, 483, 484.

[4] Commonwealth *v.* Kent, 6 Met. 221. And see Stat. Crimes, § 212; Reg. *v.* Roberts, Dears. 539.

[5] Rex *v.* Ridgeley, 1 East P. C. 171; s. c. nom. Rex *v.* Ridgelay, 1 Leach, 4th ed. 189. See Rex *v.* Foster, 7 Car. & P. 495.

the genuine should be current at the time the counterfeit is passed.[1]

§ 296. **Coin by Law made Current, &c.** — The Supreme Court of the United States held, in 1836, that a Spanish head pistareen is not a coin made current by law in the United States, within the act of Congress of 1825; consequently, that the counterfeiting of such a piece of money is not punishable under this act.[2]

§ 297. **Lawful Money, &c.** — In one case the court observed: It has been objected that the judgment "should have been rendered for lawful money of Virginia, according to the expression used in the writing. This we think, in substance, has been done; as lawful money of the United States would be lawful money of Virginia, or any other State or territory."[3] And especially must this be so with respect to the coin; since, by the Constitution of the United States, no State can coin money.[4]

§ 298. **Coin Current by Usage.** — In Massachusetts, a statute against counterfeiting "gold coin current by law or usage within the State," is held not to include a "California five-dollar gold piece," as it was called; because this coin was manufactured in one of the States contrary to the Constitution of the United States; and, "if proved to be in circulation," said the judge, "it could never be denominated a coin 'current by usage,' for no usage can be set up in direct violation of a law forbidding it."[5]

V. *Remaining and Connected Questions.*

§ 299. **Felony or Misdemeanor.** — If views before mentioned[6] are correct, there is no common law in a State making an offence against the coin more than a misdemeanor. Wherever, therefore, in our States, this offence is felony, it is such only by force of some statute.[7] In England, the uttering of counterfeit coin

[1] The State *v.* Shoemaker, 7 Misso. 177, 182.

[2] United States *v.* Gardner, 10 Pet. 618.

[3] Cocke *v.* Kendall, Hemp. 236, 238.

[4] Ante, § 280.

[5] Commonwealth *v.* Bond, 1 Gray, 564.

[6] Ante, § 284 et seq.

[7] In Wisconsin, by statute, "the term felony when used in any statute shall be construed to mean an offence for which the offender, on conviction, shall be liable by law to be punished by death, or by imprisonment in a State prison;" and the court deemed that this "does not necessarily make an offence a felony, which before the statute was a mere misdemeanor, but it affords a definite meaning for a technical law term, which, without this statute, in some respects would be indefinite and vague." There-

is misdemeanor;[1] differing herein from counterfeiting itself, which is now a felony.[2] But until lately the English courts, overlooking this distinction, have adjudicated cases of uttering as though the offence were a felony, applying to it the law of principal and accessory, and the like.[3]

§ 300. **Conclusion.** — To the casual reader, the present chapter will appear less complete than most others in this volume. But one who will place before him, first, the statutes of his own State, then the pages of this chapter, lastly those of the corresponding chapter on Forgery, will have nearly all the light on the subject derivable from books other than full reports. There are many points not mentioned in these pages simply because they have not become matter of judicial determination.

fore, though another statute made the uttering of counterfeit coin punishable in the State prison, yet, inasmuch as such uttering was only a misdemeanor at the common law, it was held to remain such notwithstanding the concurrent operation of the statutes. Wilson *v.* The State, 1 Wis. 184, 188, 194. See Miller *v.* People, 2 Scam. 233. On this general question, consult Vol. I. § 617; Stat. Crimes, § 123, 126, 145.

[1] Reg. *v.* Greenwood, 2 Den. C. C. 453, 9 Eng. L. & Eq. 535; Stat. 24 & 25 Vict. c. 99, § 9–12.

[2] Vol. I. § 479; ante, § 279.

[3] Reg. *v.* Greenwood, supra, in which Parke, B., said: "At common law persons who, in felony, would have been accessories before the fact, in cases of misdemeanor were treated as principals. I think, therefore, that the case of Rex *v.* Else, Russ. & Ry. 142, and Reg. *v.* Page and Jones, 1 Russ. Crimes (3d Eng. ed.), 82, 9 Car. & P. 761, were wrongly decided, and the comments on those decisions in 1 Russ. Crimes, 82, are well worthy of consideration." And see Reg. *v.* Gerrish, 2 Moody & R. 219; Rex *v.* Skerrit, 2 Car. & P. 427; Reg. *v.* Bannen, 2 Moody, 309, 1 Car. & K. 295; Rex *v.* Manners, 7 Car. & P. 801; United States *v.* Morrow, 4 Wash. C. C. 733; Rasnick *v.* Commonwealth, 2 Va. Cas. 356; The State *v.* Stutson, Kirby, 52.

For DEAD BODIES, see SEPULTURE.
DISORDERLY HOUSE, see Vol. I. § 1106 et seq.

CHAPTER XIV.

DISTURBING MEETINGS.[1]

§ 301. **Elsewhere — (Common Law).** — The common-law offence of disturbing meetings is sufficiently explained in the first volume.[2]

Here — (Statutory). — Practically the proceedings are nearly all upon the statutes, which, however, do not have the effect to abrogate the offence under the common law.[3] We shall consider the doctrines under them, as far as the limited number of decisions in the books will enable us to do, in the present chapter.

§ 302. **Meeting of like Kind — (School — Temperance).** — A statute having made punishable "every person who shall wilfully interrupt or disturb any school or other assembly of people, met for a lawful purpose, within the place of such meeting or out of it,"[4] the court refused to restrict its interpretation to meetings of a like kind with schools,[5] and held it applicable to one for the discussion of temperance.[6]

§ 303. **Religious Meeting — (Services progressing or not).** — There are various statutes directed specifically against the disturbance of religious meetings. Thus in Virginia it is made punishable if "any person shall, on purpose, maliciously or contemptuously disquiet or disturb any congregation assembled in any church, meeting-house, or other place of religious worship." And this was held applicable to disturbances, not only during the progress of religious services, but equally at any time while the congregation is together for worship. Hence it protects a Methodist camp ground, at night, after the services are over for the

[1] For the pleading, practice, and evidence, see Crim. Proced. II. § 284 et seq. See, also, as to the law, Stat. Crimes, § 211, 560.

[2] Vol. I. § 542.

[3] People *v.* Crowley, 23 Hun, 412.

[4] Mass. Stat. 1849, c. 59.

[5] Stat. Crimes, § 245, 246.

[6] Commonwealth *v.* Porter, 1 Gray, 476. And see post, § 307; Summerlin *v.* The State, 3 Texas Ap. 444.

day and the worshippers are retired to rest.[1] But the direct reverse of this conclusion was reached under the Missouri statute.[2] And it was also held in this State — the statutory words being "assembly met for religious worship" — that the offence is not committed by a disturbance in the church yard after the congregation is dismissed.[3] Now, —

§ 304. **Continued.** — Whatever may be said of the last point, the general doctrine accords more nearly with the Virginia rulings than with the Missouri. And it is, that, at all times when the congregation is assembled for worship, a disturbance is within the statute and punishable, being as completely within its spirit as its terms, though the actual worship has not commenced, or though it has ended. It is so even where the congregation has been formally dismissed and is retiring, and a part of the people have left; "so long," in the words of White, J., in a Texas case, "as any portion of the congregation remains upon the ground."[4] Still, to constitute a congregation "assembled," there must be some collection of people already made.[5] In Tennessee, the doctrine is illustrated as follows. The statutory words are, "if any person shall interrupt a congregation assembled for the purpose of worshipping the Deity," &c.; and they are held to be violated by a disturbance at any time before the assembly has dispersed,[6] even after the religious services are over, and the church authorities are together for the trial of a member. If, in the language of Caruthers, J., "a religious assembly, whether large or small," is "engaged in public worship, or duties connected with their interests as a church," to such an assembly the protection of the statute will extend.[7]

§ 305. **Continued.** — The words of the Indiana statute are, "any religious society, or any members thereof, when met or meeting together for public worship." And, said Worden, J.: "The point of time when they should be considered as being met together, or when they should be considered as having dispersed,

[1] Commonwealth *v.* Jennings, 3 Grat. 624.

[2] The State *v.* Edwards, 32 Misso. 548.

[3] The State *v.* Jones, 53 Misso. 486.

[4] Dawson *v.* The State, 7 Texas Ap. 59, 60; Richardson *v.* The State, 5 Texas Ap. 470; Lancaster *v.* The State, 53 Ala. 398; Kinney *v.* The State, 38 Ala. 224; The State *v.* Ramsay, 78 N. C. 448; The State *v.* Lusk, 68 Ind. 264.

[5] The State *v.* Bryson, 82 N. C. 576.

[6] Williams *v.* The State, 3 Sneed, 313.

[7] Hollingsworth *v.* The State, 5 Sneed, 518, 520.

we regard as a question of fact, or, perhaps, a mixed question of law and fact, rather than a pure question of law." Therefore it was left with the jury to determine, whether, immediately after the benediction was pronounced, and the people had passed out of the house, but before the members had dispersed, they were "met together for public worship," within the meaning of the statute.[1]

§ 305 *a*. **Sunday-school.** — An ordinary Sunday-school, where the Bible and religious precepts are taught, is a worshipping assembly within these statutes.[2]

§ 306. **School.** — A statute made punishable the wilful disturbance or interruption of any teacher or pupils in any school, kept in "any school-house or other place of instruction." And a private school for penmanship, in a district school-house, was held to be within its protection.[3]

§ 307. **Continued — Moral and Benevolent Object.** — A statute making it punishable to disturb persons met "for the promotion of any moral and benevolent object," was held to include a meeting for culture and improvement in sacred and church music. The words of another statute being, "any district school, or any public, private, or select school, while the same is in session;" the court deemed that, to bring a case within them, there must be a teacher as well as pupils. Therefore a meeting of persons to sing together for mutual improvement in the art, but without any teacher, was not a "school," such as the statute contemplates. "Indeed," said Sanford, J., "the term 'school' alone, according to American usage, more generally denotes the collective body of pupils in any place of instruction, and under the direction and discipline of one or more instructors."[4]

§ 307 *a*. **Rightfulness of Meeting.** — The statutes have been construed to extend their protection only to such meetings as are in a sense lawful or in their proper places. At least, if persons will hold their meetings in the streets, the laws will not protect them from interruptions which the common use of the streets creates.[5] But under a statute making punishable the disturbance of "any

[1] The State *v.* Snyder, 14 Ind. 429, 430. See, however, ante, § 304; also The State *v.* Gager, 28 Conn. 232. As to the later law in Indiana, see Marvin *v.* The State, 19 Ind. 181; Vol. I. § 35 note.

[2] Martin *v.* The State, 6 Baxter, 234.

[3] The State *v.* Leighton, 35 Maine, 195. See The State *v.* Adams, 2 Lea, 647.

[4] The State *v.* Gager, 28 Conn. 232.

[5] The State *v.* Schieneman, 64 Misso 386.

congregation assembled for religious worship and conducting themselves in a lawful manner," it was held to be no defence for one that he believed the congregation to be, instead of so conducting, trespassing on the right of another congregation to occupy the meeting-house.[1] Perhaps, in some circumstances, it may be matter of consideration that the assembled persons are defending themselves by undue measures.[2]

§ 308. **What is Disturbance.** — Something of this, under the common law, was seen in the first volume.[3] Shaw, C. J., contemplating a statute before quoted,[4] said that the question "cannot easily be brought within a definition applicable to all cases; it must depend somewhat on the nature and character of each particular kind of meeting, and the purposes for which it is held, and much also on the usage and practice governing such meetings. . . . It must be decided as a question of fact in each particular case; and, although it may not be easy to define it beforehand, there is commonly no great difficulty in ascertaining what is a wilful disturbance in a given case. It must be wilful and designed, an act not done through accident or mistake."[5] Still, —

[1] Dorn *v.* The State, 4 Texas Ap. 67. Compare with doctrines post, § 490, 501, 502, 504, 505.

[2] Rasberry *v.* The State, 1 Texas Ap. 664. And see Ross *v.* The State, 2 Dutcher, 224.

[3] Vol. I. § 542.

[4] Ante, § 302.

[5] Commonwealth *v.* Porter, 1 Gray, 476, 480. **Rights of Audience at Theatre.** — In an Irish case, Bushe, C. J., speaking of the rights of an audience at a theatre, said, they were well defined, and were as follows: "They [the audience] may cry down a play or other performance, which they dislike, or they may hiss or hoot the actors who depend upon their approbation or their caprice. Even that privilege, however, is confined within its limits. They must not break the peace, or act in such a manner as has a tendency to excite terror or disturbance. Their censure or approbation, although it may be noisy, must not be riotous. That censure or approbation must be the expression of the feelings of the moment; for, if it be premeditated by a number of persons confederated beforehand to cry down even a performance of an actor, it becomes criminal. Such are the limits and privileges of an audience, even as to actors and authors." Rex *v.* Forbes, 1 Crawf. & Dix C. C. 157. In another case, Sir James Mansfield, C. J., said to the jury: "I cannot tell upon what grounds many people conceive they have a right, at a theatre, to make such a prodigious noise as to prevent others from hearing what is going forward on the stage. Theatres are not absolute necessaries of life; and any person may stay away who does not approve of the manner in which they are managed. . . . The audience have certainly a right to express by applause or hisses the sensations which naturally present themselves at the moment; and nobody has ever hindered, or would even question, the exercise of that right. But if any body of men were to go to the theatre with the settled intention of hissing an actor, or even damning a piece, there can be no doubt that such a deliberate and preconcerted scheme would

§ 309. **Disturbance defined.** — It is believed that, in a sort of general way, disturbance may be defined to be any conduct which, being contrary to the usages of the particular sort of meeting and class of persons assembled, interferes with its due progress and services, or is annoying to the congregation in whole or in part. Thus, —

Part of Assembly. — Not all the assembly need be disturbed. It is immaterial that the witnesses were not, while others were.[1] Again, —

Noise. — The cracking of nuts and other forms of noise, contrary to the purposes of the meeting, — as, during a religious service, and more especially during the time of prayer, — are disturbances.[2]

Violent and Insulting Discourse — Speaking without Permission. — Where one is given leave to speak by the conductor of a meeting, he becomes guilty of a disturbance if he indulges in a violent and insulting discourse, contrary alike to the spirit of the permission and to good conduct. Nor is it any excuse or justification that he was not called to order.[3] Especially, therefore, one who, without permission, and contrary to the remonstrance of the presiding officer, speaks and continues to speak when called to order, subjects himself to indictment as a disturber.[4]

Hisses and Applause. — We saw in a note to the last section, that an audience at a theatre may hiss and applaud. But no one would contend that either would be quite lawful in a solemn, religious service. Yet even religious meetings have been con-

amount to a conspiracy, and that the persons concerned in it might be brought to punishment. If people endeavor to effect an object by tumult and disorder, they are guilty of a riot. It is not necessary, to constitute this crime, that personal violence should have been committed, or that a house should have been pulled in pieces." Clifford *v.* Brandon, 2 Camp. 358, 368, 369. In a note to this case, p. 372, the reporter says: "Macklin, the famous comedian, indicted several persons for a conspiracy to ruin him in his profession. They were tried before Lord Mansfield; and, it being proved that they had entered into a plan to hiss him as often as he appeared on the stage, they were found guilty under his lordship's direction; but the prosecutor declined calling upon them to receive the judgment of the court. I have not been able to find any authentic account of the trial." And see ante, § 216. **Forcing One's Way into Meeting.** — As to disturbing a lyceum by attempting to force the way into a room where it was held, see The State *v.* Yeaton, 53 Maine, 125.

[1] Holt *v.* The State, 1 Baxter, 192. And see Friedlander *v.* The State, 7 Texas Ap. 204.

[2] Hunt *v.* The State, 3 Texas Ap. 116; Friedlander *v.* The State, 7 Texas Ap. 204; Hicks *v.* The State, 60 Ga. 464. And see Copping *v.* The State, 7 Texas Ap. 61.

[3] Lancaster *v.* The State, 53 Ala. 398.

[4] The State *v.* Ramsay, 78 N. C. 448.

ducted in ways not solemn, with permitted applause if not also with hisses. In such a meeting, doubtless a round roar might be sent up, at the proper moment, in praise of the preacher, without rendering him who worshipped in that form liable to be indicted for crime. Again, among one class of religionists, a solemn amen would be permissible, where among another class it would not be.

Meeting not broken up. — When the interruption is of the indictable sort, it need not, to be obnoxious to the law, proceed so far as to break up the meeting, or create an actual pause in the proceedings.[1]

§ 309 *a*. **Carrying Weapons into Meetings.** — In some of the States, statutes specifically forbid the carrying of weapons into meetings.[2]

§ 310. **The Intent.** — In Alabama, a statute having made punishable "any person who *wilfully*[3] interrupts or disturbs any assemblage of people met for religious worship, by noise, profane discourse," &c., the offence was held not to be committed when the act was done "recklessly." The disturbance, to be within the statute, it was said, must be intentional, in distinction from any mere reckless conduct.[4] And in North Carolina it was held, that, where there is no intent to disturb the meeting, one who is admitted to be conscientiously taking a part in its exercises does not commit the offence though he joins in the singing in a voice so peculiar as to create "irresistible laughter."[5]

§ 310 *a*. **Rules of Meeting.** — It accords with what has already been said to add, that, as meetings of different sorts are differently conducted and with different rights of the audience,[6] such rights must be deemed to proceed from the will of those who control the meetings and are responsible for their results. For example, the presumption is, that the managers of a theatre allow hisses and applause, such being appropriate to the nature of the meeting and customary thereat. So every other meeting will have its implied rules.[7] But, in reason, there may also be express rules, and to them the attendants on the meeting must con-

[1] Brown *v.* The State, 46 Ala. 175; McElroy *v.* The State, 25 Texas, 507.

[2] Owens *v.* The State, 3 Texas Ap. 404; Bush *v.* The State, 6 Texas Ap. 421.

[3] See Stat. Crimes, § 824.

[4] Harrison *v.* The State, 37 Ala. 154, 156; Brown *v.* The State, 46 Ala. 175.

[5] The State *v.* Linkhaw, 69 N. C. 214. And see Richardson *v.* The State, 5 Texas Ap. 470.

[6] Ante, § 308 and note, 309.

[7] And see The State *v.* Ramsay, 78 N. C. 448.

form. So that, if the managers of a theatre should in terms forbid by rule all expressions of approbation and disapprobation, persons voluntarily attending a performance with notice thereof would be under compulsion to comply. But it has been deemed that a rule of a religious society, forbidding any one to leave a meeting which he has entered until its services are ended, except by permission, is void as to one who had no knowledge of it when entering. "We think it clearly illegal. It is an infringement upon natural liberty and private right not to be tolerated. Nor can it in law excuse or protect the officers of the church from the responsibility of any crime they may commit in enforcing such illegal rule." [1]

[1] People *v.* Wertendyke, 1 Wheeler Crim. Cas. 124, 125. In this case, there is no judicial intimation that the result would be otherwise if the person who undertook to go out knew of the rule when he went in. The facts did not raise that question. But plainly, in reason, if he had knowledge of the rule, he consented to it, and by the act of entering bound himself to a compliance with its terms.

For DRUNKENNESS, see Stat. Crimes. As an excuse for Crime, see Vol. I. § 397–416.

CHAPTER XV.

DUELLING.[1]

§ 311. **The Killing is Murder.** — Persons who deliberately engage in a duel, conducted, however fairly, according to the law of honor, are not protected by the law of the land; and, when one kills the other, the party killing is guilty of murder.[2]

Seconds, &c. — So all present, giving countenance and encouragement to the transaction, such as seconds and the like, are in the same condemnation.[3] This extends even to the surgeon.[4]

§ 312. **Acts short of Murder.** — In an early English case before the court of Star-Chamber, it was said in relation to duelling, "that, by the ancient law of the land, all inceptions, preparations, and combinations to execute unlawful acts, though they never be performed, . . . are punishable as misdemeanors." And where one of the defendants had sent a challenge, which was declined, and the other defendant had been the bearer of it, both

[1] For matter relating to this title, see Vol. I. § 10 and note, 143, 540, 654. And see post, HOMICIDE. For the pleading, practice, and evidence, see Crim. Proced. II. § 302 et seq.

[2] Vol. I. § 10 and note, 654; Case of Duels, 2 Howell St. Tr. 1033, 1038; Mawgridge's Case, 17 Howell St. Tr. 57, 66; Smith *v.* The State, 1 Yerg. 228; 1 Hawk. P. C. p. 96, § 21. Mr. East says: "Where two persons deliberately agree to fight, and meet for that purpose, and one is killed; the other cannot help himself by alleging, that he was first stricken by the deceased, or that he had often declined to meet him, and was urged by importunity, or that he meant not to kill, but only to disarm his adversary. For since he deliberately engaged in an act highly culpable, in defiance of the laws, he must at his peril abide the consequences." 1 East P. C. 242.

[3] Vol. I. § 628 et seq., 654; Reg. *v.* Barronet, Dears. 51; 1 Hawk. P. C. Curw. ed. p. 97, § 31; Reg. *v.* Young, 8 Car. & P. 644; Reg. *v.* Cuddy, 1 Car. & K. 210. Mr. East, after the passage quoted in the last note, proceeds: "Where the principal in deliberate duelling would be guilty of murder, so will his second; and, some have considered, the second also of him who died, because the fighting was upon a compact; though Lord Hale thinks the latter opinion too severe; but he says, it is a great misdemeanor even in him." 1 East P. C. 242. It is difficult to doubt, that, in matter of principle, even he is guilty of murder. He gave to the unlawful transaction which resulted in death exactly the same concurrence of his will, and countenance of his presence, and active exertions, which the second of the other did.

[4] Cullen *v.* Commonwealth, 24 Grat 624. And see Reg. *v.* Taylor, Law Rep 2 C. C. 147.

were convicted for the crime.[1] The doctrine is therefore settled, in England and the United States, that all acts of this sort, such as sending a challenge to fight,[2] writing a letter to provoke a challenge,[3] and the like, are indictable misdemeanors.[4] Blackstone puts this doctrine upon the proposition that such acts tend to excite breaches of the public peace;[5] and this proposition is undoubtedly just and sufficient of itself to support the doctrine. But it rests equally on other reasons; namely, those which are found in the law of attempt, as explained in the preceding volume; and those which are embodied in the law of conspiracy, as set forth in this volume; and, when any one of these three reasons upholds an indictment, it stands. On all three grounds, parties who fight without the fatal result are punishable.[6]

§ 313. **Meaning of "Duel."** — A duel is a fighting together of two persons, by previous concert, and with deadly weapons, to settle some antecedent quarrel. Under the South Carolina statute, it was decided, that any agreement to fight with loaded pistols, and an actual fighting in pursuance of it, are a duel; the matter not depending upon when the agreement was made, but upon the fact of the agreement.[7] This is clearly the correct doctrine, and the fighting is equally a duel if done with swords or rifles. Another proposition is plain, that, to constitute a duel, the fighting need not end fatally. Plainly, also, a mere challenge is not a duel; though, in a liberal use of words, it may be said to pertain to *duelling*. Again, if the fighting is a mere encounter with fists, where it is understood that neither is at liberty to take the other's life, it is not called a duel. Neither is it a duel where the fighting is on a sudden outburst of anger, and

[1] Case of Duels, 2 Howell St. Tr. 1033, 1046, 1047.

[2] Rex *v.* Philipps, 6 East, 464; Rex *v.* Newdigate, Comb. 10; Reg. *v.* Langley, 2 Ld. Raym. 1029, 1031, 6 Mod. 124; Smith *v.* The State, 1 Stew. 506; The State *v.* Perkins, 6 Blackf. 20; The State *v.* Farrier, 1 Hawks, 487.

[3] Rex *v.* Rice, 3 East, 581; Rex *v.* Williams, 2 Camp. 506; Rex *v.* Philipps, 6 East, 464; s. c. nom. Rex *v.* Phillips, 2 Smith, 550.

[4] Commonwealth *v.* Tibbs, 1 Dana, 525. Hawkins says: "It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to endeavor to provoke another to send a challenge, or to fight; as by dispersing letters to that purpose, full of reflections, and insinuating a desire to fight, &c." 1 Hawk. P. C. Curw ed. p. 487, § 3.

[5] 4 Bl. Com. 150. And see The State *v.* Taylor, 3 Brev. 243, 1 Tread. 107; 1 Russ. Crimes, 3d Eng. ed. 297.

[6] Commonwealth *v.* Lambert, 9 Leigh, 603.

[7] Herriott *v.* The State, 1 McMullan, 126.

not by mutual agreement. There are laws of honor, as they are called, regulating duels; yet doubtless a fighting may be, in law, a duel, though these laws are violated, — just as a confinement of a man may be an imprisonment, though not proceeded in lawfully. It may be a question whether or not the use of deadly weapons is absolutely essential to a duel; but, at least, the fighting must be on such mutual agreement as permits the one to take the life of the other.

§ 314. **The Challenge.** — The fighting is usually preceded by what is termed a challenge. It is immaterial, both under statutes and at the common law, whether the challenge is verbal or written.[1] For the crime is in the invitation to fight, and it is complete when this invitation is in any way delivered.[2] The words also in which it is given are unimportant: if they are intended for a challenge, and to be so understood, they come within the law, even though, to common apprehension, their signification is less broad.[3] But in an old English case, the words, "You are a scoundrel, and defrauded the king of his duty; I will pick you to the heart, and call you to an account," were held, under the circumstances presented to the court, not to be sufficient to authorize an information for challenging to a duel; though an information was granted on them as for a libel.[4] There is a difference between challenging and accepting a challenge; and the mere expression of a willingness to do the latter does not constitute the former.[5]

§ 315. **Where to be fought.** — It makes no difference, as to the indictability of the challenge, that the duel contemplated is to take place in another country or State.[6]

[1] The State *v.* Perkins, 6 Blackf. 20; 1 Hawk. P. C. Curw. ed. p. 487, § 3.

[2] The State *v.* Taylor, 1 Tread. 107; Commonwealth *v.* Tibbs, 1 Dana, 525. **Attempt short of Challenge.** — The sending of a letter provoking a challenge is an offence, though the letter never reaches its place of destination. Rex *v.* Williams, 2 Camp. 506.

[3] Commonwealth *v.* Pope, 3 Dana, 418; Ivey *v.* The State, 12 Ala. 276; Gordon *v.* The State, 4 Misso. 375. And see The State *v.* Farrier, 1 Hawks, 487.

[4] Rex *v.* Pownell, W. Kel. 58. In Illinois it has been deemed not to be a challenge to send a letter containing such expressions as, "It appears that a nife is your faverite of setling fuses, and if so bea the case you can consider that it will sute me you are a Cowerd and darsent to except of the offer. i want the same chanse of sharpening mi nife you can set your day and i will be on hans.' Aulger *v.* People, 34 Ill. 486.

[5] Commonwealth *v.* Tibbs, 1 Dana, 525.

[6] The State *v.* Farrier, 1 Hawks, 487; The State *v.* Taylor, 3 Brev. 243, 1 Tread. 107; Ivey *v.* The State, 12 Ala. 276; Vol. I. § 143. See The State *v.* Cunningham, 2 Speers, 246.

§ 316. **Statutes.** — Besides the common-law doctrine, we have various statutes, national and State, against duelling, and sending, receiving, and carrying challenges [1] to fight, and against some other offences connected therewith.[2] Some of the statutes are broader in their terms, some are less broad, than the common law. The Alabama act, for instance, does not extend to the case of giving a challenge; and the court seems to have entertained the opinion, that it operates as a constructive repeal of the common law on this point;[3] a conclusion, however, which is repugnant to the doctrines of statutory interpretation generally applied elsewhere.[4]

§ 317. **The Punishment.** — Where the duel amounts to a felonious homicide, the punishment is not a part of the case needing explanation here. The minor offences now under consideration are misdemeanors at the common law, and the observations made in the former volume concerning the punishment of misdemeanor are applicable to them.[5] A statute which provides, that the offender "shall be incapable of holding or being elected to any post of profit, trust, or emolument, civil or military, within this State," was held in New York to be constitutional.[6]

[1] The bearer, it has been held, must know that what he carries is a challenge. United States *v.* Shackelford, 3 Cranch, C. C. 178.

[2] The South Carolina act of 1812, against sending a challenge, embraces the principals. The State *v.* Dupont, 2 McCord, 334. And see further for the construction of this statute, The State *v.* Cunningham, 2 Speers, 246. See also Moody *v.* Commonwealth, 4 Met. Ky. 1; Heffren *v.* Commonwealth, 4 Met. Ky. 5.

[3] Smith *v.* The State, 1 Stew. 506.

[4] Stat. Crimes, § 154–159.

[5] Vol. I. § 940–947.

[6] Barker *v.* People, 3 Cow. 686, 20 Johns. 457; Vol. I. § 944. See, also, as to this, Commonwealth *v.* Jones, 10 Bush, 725.

For EAVESDROPPING, see Vol. I. § 1122–1124.
ELECTION FRAUDS AND OBSTRUCTIONS, see Stat. Crimes.

CHAPTER XVI.

EMBEZZLEMENT.[1]

§ 318. Introduction.
319–330. History, Statutes, and General View.
331–351. Classes of Persons embezzling.
352–355. Confidence in the Person embezzling.
356–371. Thing embezzled.
372–378. Act by which Embezzlement is effected.
379. The Intent.
380–383. Remaining and Connected Questions.

§ 318. **Order of this Chapter.** — We shall consider, I. History, Statutes, and General View; II. The Classes of Persons embezzling; III. The Confidence in the Person embezzling; IV. The Thing embezzled; V. The Act by which the Embezzlement is effected; VI. The Intent; VII. Remaining and Connected Questions.

I. *History, Statutes, and General View.*

§ 319. **Origin of the Law.** — The law of embezzlement is statutory. It sprang from attempts to amend the law of larceny; and is, indeed, a sort of statutory larceny.

Stat. 21 Hen. 8. — The first statute on the subject was the English one of 21 Hen. 8, c. 7, which, after a considerable preamble, provides, that, where any "caskets, jewels, money, goods, or chattels" are delivered to servants by their masters or mistresses "to keep, — if any such servant or servants withdraw him or them from their said masters and mistresses, and go away with the said caskets, &c., to the intent to steal the same, and defraud his or their said masters or mistresses thereof, contrary to the trust and confidence to him or them put by his or their said masters or mistresses; or else, being in the service of his said master or mistress, without assent or commandment of

[1] For matter relating to this title, see Vol. I. § 567. And see this volume, Larceny. For the pleading, practice, and evidence, see Crim. Proced. II. § 314 et seq. See, also, Stat. Crimes, § 271, 418.

his masters or mistresses, he embezzle the same caskets, &c., or otherwise convert the same to his own use, with like purpose to steal it," — if the property is "of the value of forty shillings or above," the transaction shall be felony; provided (§ 2), that this act shall not extend to "any apprentice or apprentices, nor to any person within the age of eighteen years," &c.

§ 320. **Object of this Statute — How interpreted.** — According to the preamble, this statute was passed to remove doubts, whether or not such misbehavior was larceny at the common law. By construction, it was strictly confined to goods delivered to the servant to *keep;* not extending to money collected, or received on a sale of property, and the like.[1]

Whether Common Law with us. — No reason appears why this statute should not have a common-law force in this country,[2] though there is little practical scope for it. In fact, it may be deemed a mere confirmation of a common-law doctrine concerning larceny.[3]

Re-enacted. — It has, in substance, been adopted into the legislation of New Jersey, New York,[4] and perhaps some of the other States.

§ 321. *Modern Enactments:* —

Stat. 39 Geo. 3. — Coming now to the statutes of embezzlement, as the term is known in the modern law, we have, in the first place, of principal enactments, Stat. 39 Geo. 3, c. 85, A. D. 1799. Though adopted since the Revolution and repealed in England, the books contain so many cases adjudged upon it, now constantly referred to as authorities in the exposition of our own statutes, that its insertion here is imperative. After a preamble it proceeds: "If any servant or clerk, or any person employed for the purpose in the capacity of servant or clerk, to any person or persons whomsoever, or to any body corporate or politic, shall,

[1] 1 Hawk. P. C. Curw. ed. p. 155, 156. And see, concerning this statute, 2 East P. C. 560–564; People *v.* Hennessey, 15 Wend. 147, 151. The statute, having been repealed, was re-enacted by 5 Eliz. c. 10.

[2] Kilty, Report of Statutes, 71, seems to think it is not of force in this country; while the Vermont court, in The State *v.* White, 2 Tyler, 352, and the Pennsylvania Judges in Report of Judges, 3 Binn. 595, 618, have declared that it is.

[3] 2 East P. C. 564. The English commissioners observe, "that this statute was superseded by subsequent declarations of the common law, which were more extensive in their operation than the statute itself." 1st Rep. Eng. Crim. Law Com. A. D. 1834, p. 21.

[4] People *v.* Hennessey, 15 Wend. 147, 151.

by virtue of such employment, receive or take into his possession any money, goods, bond, bill, note, banker's draft, or other valuable security or effects, for or in the name or on the account of his master or masters or employer or employers, and shall fraudulently embezzle, secrete, or make away with the same, or any part thereof; every such offender shall be deemed to have feloniously stolen the same from his master or masters, employer or employers, for whose use, or in whose name or names, or on whose account, the same was or were delivered to or taken into the possession of such servant, clerk, or other person so employed; although such money, goods, bond, bill, note, banker's draft, or other valuable security was or were no otherwise received into the possession of his or their servant, clerk, or other person so employed; and every such offender, his adviser, procurer, aider, or abettor, being thereof lawfully convicted or attainted, shall be liable to be transported to such parts beyond the seas as his majesty, by and with the advice of his privy council, shall appoint, for any term not exceeding fourteen years," &c.[1]

§ 322. **Stat. 7 & 8 Geo. 4.** — In 1827, the foregoing statute was superseded by 7 & 8 Geo. 4, c. 29, § 47. As to the provision now under consideration, this statute is precisely like the former one, except in employing some briefer forms of expression. It enacts "that, if any clerk or servant, or any person employed for the purpose or in the capacity of a clerk or servant, shall by virtue of such employment receive or take into his possession any chattel, money, or valuable security, for or in the name or on the account of his master, and shall fraudulently embezzle the same, or any part thereof, every such offender shall be deemed to have feloniously stolen the same from his master, although such chattel, money, or security was not received into the possession of such master otherwise than by the actual possession of his clerk, servant, or other person so employed; and every such offender, being convicted thereof, shall be liable at the discretion of the court to any of the punishments which the court may award," &c.[2] This was, till recently, the leading English statute on the subject; but there were statutes of secondary importance, providing for cases which this one was not sufficiently broad to comprehend.

[1] And see 1 Hawk. P. C. Curw. ed. p. 157; 3 Chit. Crim. Law, 920 *a*.

[2] See 2 Russ. Crimes, 3d Eng. ed. 167

§ 323. **Stat. 24 & 25 Vict.** — But, at the present time, the provision thus recited is superseded by 24 & 25 Vict. c. 96, § 68, as follows: "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed," &c. And the reader perceives, that this statute operates to change the English law of embezzlement in one or two particulars, yet, in others, to leave it as before.[1]

§ 324. *Our Statutory Laws:* —

General View. — Our law of embezzlement, therefore, had its origin in English statutes, not in the common law of England, or in any statutes which, by reason of their early date, became common law with us. We have seen that the earlier and later English statutes have differed somewhat from one another; ours, in a sort of general way, are modelled on the English, yet differing

[1] **How differs from Earlier Provisions.** — Mr. Greaves says: "The words of the former enactments were, 'shall, *by virtue of such employment*, receive or take into his possession any chattel, &c., for or in the name or on the account of his master.' In the present clause the words 'by virtue of such employment' are advisedly omitted in order to enlarge the enactment, and get rid of the decisions on the former enactments. The clause is so framed as to include every case where any chattel, &c., is delivered to, received, or taken possession of by, the clerk or servant for *or* in the name *or* on account of the master. If, therefore, a man pay a servant money for his master, the case will be within the statute though it was neither his duty to receive it, nor had he authority to do so; and it is perfectly just that it should be so; for, if my servant receive a thing, which is delivered to him for me, his possession ought to be held to be my possession, just as much as if it were in my house, or in my cart. And the effect of this clause is to make the possession of the servant the possession of the master wherever any property comes into his possession within the terms of this clause, so as to make him guilty of embezzlement if he converts it to his own use. The cases of Rex *v.* Snowley, 4 Car. & P. 390; Crow's Case, 1 Lewin, 88; Rex *v.* Thorley, 1 Moody, 343; Rex *v.* Hawtin, 7 Car. & P. 281; Rex *v.* Mellish, Russ. & Ry. 80, and similar cases, are consequently no authorities on this clause. These cases and the words of the former and present clauses were brought before the select committee of the Lords, and they unanimously agreed that the law ought to be altered, and that the present clause did alter it effectually.' Grea. Crim. Law, Acts, 156.

more or less from them, and they differ from one another. It will not be best to burden these pages with a collection of American statutes here, but we shall see something of their differences as we proceed.

§ 325. *Further General Views:* —

Embezzlement, what. — In terms not very precise, the offence to be discussed in this chapter may be described as the embezzling of property designated by the statutes, by the persons, and under the circumstances specified therein.[1] And embezzlement is, as proposed to be defined in New York, "the fraudulent appropriation of property by a person to whom it has been intrusted."[2] This definition is a good one, taken in connection with statutory provisions in harmony with it; but, for a general definition, to be applied to varying and unknown statutes, some extending the offence to greater numbers of classes of fiduciary persons and to more kinds of property than others, and some requiring different circumstances of possession from others, the following is preferred: Embezzlement is the fraudulent appropriation of such property as the statutes make the subject of embezzlement, under the circumstances in the statutes pointed out, by the person embezzling, to the injury of its owner. It is true, that this does not appear to be really a definition at all; and, indeed, there is a sense in which it is not, because, of necessity, since the offence is statutory, we are obliged to look to the statute for its exact limits.

§ 326. **Caution.** — Seeing that the statutes are numerous, and in some respects diverse in their provisions, the practitioner should be cautious about coming to conclusions, upon a question under the law of embezzlement, unless, when he examines a decision relied upon, he first sees whether the statute on which it was rendered is, in its terms, the same with the one of his own State.[3]

§ 327. **Whether Embezzlement is Larceny.** — The statutes, above quoted, the reader perceives, declare that the person embezzling "shall be deemed to have feloniously stolen" the thing embezzled. And this is the more common form of the enactment, not only in England, but likewise in this country. Under these

[1] Ex parte Hedley, 31 Cal. 108, 111.

[2] Draft of a Penal Code, A. D. 1864, § 601.

[3] Griffin *v.* The State, 4 Texas Ap. 390, 409.

statutes, is embezzlement larceny? In one view it plainly is; because the law is, in the absence of a constitutional impediment, what a statute declares it to be. Therefore, —

Receiving Stolen Goods. — If, after goods are embezzled contrary to a statute in this form, a third person feloniously receives them, he may be convicted on a count charging him with receiving stolen goods knowing them to be stolen.[1]

Form of the Indictment. — Yet, in matter of form, a person indicted for larceny cannot be convicted on evidence showing a statutory embezzlement; but the indictment for the embezzlement must be framed upon the statute.[2] Counts for larceny and for embezzlement may perhaps be joined;[3] or, to be exact, they may be where embezzlement is, like larceny, a felony;[4] but, where the one is felony and the other misdemeanor, they cannot be joined under the common-law rules on the subject, while under modifications prevailing in some of our States they may be.[5] Hence, —

Separate Offence. — In a practical view, this sort of statutory larceny is a separate offence, called embezzlement; and, under the latter name, and as a crime by itself, it is usually treated of in the books. Some of the American enactments depart from the English model, by omitting the clause which declares the offence to be larceny.

§ 328. **Whether same Act both Embezzlement and Larceny.** — According to a doctrine brought to view in our first volume,[6] if embezzlement is misdemeanor while larceny is felony, the same evil act cannot be both; that is, if it is made embezzlement by the statute, as interpreted by the courts, it cannot thereafter be a larceny, whatever it was before; or, if it is still a larceny, it cannot also be embezzlement. But where both crimes are of the same grade, it accords with established principles to hold, that, if an act is sufficiently covered by the terms of the statute, it is embezzlement, while still, if before the statute it was larceny, it remains such, and it may be indicted as the one or the other at

[1] Reg. *v.* Frampton, Dears. & B. 585.

[2] Crim. Proced. II. § 316–318; 1 Hawk. P. C. Curw. ed. p. 158; Commonwealth *v.* Simpson, 9 Met. 138; Fulton *v.* The State, 8 Eng. 168. And see People *v.* Allen, 5 Denio, 76. See Reg. *v.* Moah, Dears. 626, 35 Eng. L. & Eq. 592; Reg. *v.* Gorbutt, Dears. & B. 166. For the reason of this, see Stat. Crimes, § 414–429.

[3] 3 Chit. Crim. Law, 921; 2 Russ. Crimes, 3d Eng. ed. 185.

[4] Crim. Proced. I. § 424.

[5] Crim. Proced. I. § 445, 446.

[6] Vol. I. § 787.

the election of the prosecutor.[1] In fact, most of the statutes on this subject make embezzlement a felony, the same as larceny. Still it is sometimes assumed, that the two offences of larceny and embezzlement do not run into each other, but that where the one ends the other begins.[2] And Chitty seems to look upon the statute as not applying to cases which were larceny at the common law.[3] On the other hand, the English commissioners, while proposing a rule the reverse of this which Chitty seems to accept, observe, it "is, perhaps, in strictness unnecessary," being "founded on the well-known principle that no one shall take advantage of his own wrong."[4] As just intimated, this is plainly the sound view of the common law.[5]

§ 329. **Continued.** — Such, also, is the plain dictate of reason. Suppose, for instance, the taking of the article alleged to have been embezzled was such as amounts to a common-law larceny of it, why should not an indictment for this embezzlement be maintainable at the election of the prosecuting power, as well as one for larceny, provided the act done was within the terms of the statute, and no previous prosecution had been had for it as a larceny? This question, of course, assumes that there is no technical objection, such as occurs where embezzlement is only a misdemeanor while larceny is felony. But, again, if a man claiming to be a servant should sell an article of his master's under circumstances to make the sale of it a larceny of the article, yet also to bind the master by the sale, the money received

[1] Stat. Crimes, § 143, 154, 164, 173, 174.

[2] Fulton *v.* The State, 8 Eng. 168; Kibs *v.* People, 81 Ill. 599; post, § 366, 367 and note.

[3] 3 Chit. Crim. Law, 921, referring to Rex *v.* Headge, 2 Leach, 4th ed. 1033, Russ. & Ry. 160; Peck's Case, 2 Stark. Ev. 842.

[4] Act of Crimes and Punishments, A. D. 1844, p. 188. The Parliament, however, finally adopted the provision, that, "if, upon the trial of any person indicted for embezzlement, &c., it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return, as their verdict, that such person is not guilty of embezzlement, but is guilty of simple larceny, or of larceny as a clerk, &c., and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny." Stat. 14 & 15 Vict. c. 100, § 13. See Archb. New Crim. Proced. 458. This statute was re-enacted in nearly the same words, in 24 & 25 Vict. c. 96, § 72, which superseded it, and contained also the like provision to meet the case if the indictment should be for larceny, and the proof should be of embezzlement. As to the construction of these enactments, see Reg. *v.* Gorbutt, Dears. & B. 166.

[5] See, on this question, the principles stated in Stat. Crimes, supra, and V. L. I. § 791, 799, 812–815, 1060, 1064.

for the article would belong to the master, and an indictment ought to lie for embezzling this money. In this instance, the two transactions would be distinct; and, though embezzlement were misdemeanor and larceny felony, either form of the prosecution should properly be maintainable. Still it is plain to one who has read all the cases, that, in some of them, these obvious distinctions have been overlooked.

§ 330. **Diversities of Statutes — Consequences.** — In our examinations of this crime, we should constantly bear in our minds what has been already mentioned, that these statutes, English and American, are numerous, and differ more or less both in language and in meaning. A dozen differing statutes may be found to be alike at particular places; or, if not in exact phrase, so nearly so that the decisions upon any one of them may be received as reasonably safe guides for the exposition of any other. At other places, the dissimilar terms may require dissimilar judgments. The result is, that our inquiries in this chapter are of a compli cated nature; and, if we would prosecute them to any profit, we must constantly keep in our minds both the words of the statutes, and the legal principles on which the individual adjudications proceed.

II. *The Classes of Persons embezzling.*

§ 331. **General View.** — These statutes of embezzlement, being penal, are not to be extended by construction to persons not within their words, even though within their obvious spirit and intent.[1] Now, the reader has seen, that there are various terms, such as "agent," "servant," "clerk," and the like, employed in them, to designate the classes of persons within their penalties. In "Statutory Crimes," is given a brief view of the meaning of some of the words;[2] but we must also look at them here, with special reference to the present subject.

§ 332. **Agent — Servant — Clerk.** — The most frequent terms to indicate the person embezzling, are "agent," "servant," and "clerk." We saw, in "Statutory Crimes," that, according to an old doctrine, now exploded in England, and not uniformly fol-

[1] Stat. Crimes, § 119, 193, 194, 220.

[2] See Stat. Crimes, § 271, 326.

lowed in this country, when a statute enumerates several things, in words so broad in meaning as to overlie one another, the less specific are narrowed in the interpretation to prevent this overlying."[1] Now, the words of our principal statutes are "agent, servant, or clerk;" and, if the exploded doctrine were to be applied to them, the person offending could be deemed to belong to only one of these three classes, not to two or to all, and the pleader must select, at his peril, one, and only one, which the count should charge him as being. But the author is not aware that any attempt has been made to apply this doctrine to these statutes; consequently, if the pleader is satisfied the defendant is either an "agent," a "clerk," or a "servant," he selects the term which pleases him best; then, should the proofs sustain the allegation in this respect, all is well, though it should appear that one of the other statutory terms would be equally appropriate.[2]

§ 333. **Correlatives — Master, Servant — Principal, Agent — Clerk, Employer.** — In considering whether a person is a servant, &c., or not, we should bear in mind, that, as in matrimonial law there cannot be a wife without a husband,[3] so in the law of embezzlement there cannot be a clerk without an employer, a servant without a master, an agent without a principal. This is a nice test, yet it is an important one. Let us see, a little, how it is applied.

§ 334. **Illustrations — (Officers in Corporations — Relations to Fellow-officers).** — Thus, in an action of slander for accusing the plaintiff of embezzlement as the servant of the mayor, aldermen, and burgesses of the borough of Warwick, the evidence of his being such was, that he was one of the four chamberlains of some commonable lands belonging to the borough, chosen at a court-leet, and sworn in by the steward. The duties of chamberlain, which are discharged gratuitously, are to collect money from persons using the lands; to employ it in keeping them in order; to account, at the end of the year, to two aldermen of the corporation; and to pay over any balance to his successor in office. And it was held, that, this being his relation to the borough, and these his duties, he could not be guilty of embez-

[1] Stat. Crimes, § 247.
[2] And see Stat. Crimes, § 326.
[3] 1 Bishop Mar. & Div. § 151, 874; 2 Ib. § 156, 698, 700, 701.

zlement, within Stat. 7 & 8 Geo. 4, c. 29, § 47.[1] Said Bayley, B.: "The statute appears to me to apply to ordinary clerks or servants, having masters to account to for the discharge of their duties. Now, can the plaintiff be said to be such clerk or servant? He was not nominated chamberlain by the mayor and corporation, or by the commoners, but by the jury of the court-leet held annually by the corporation as lords of the manor, and was sworn in there, as many other persons are. Then, can the mayor and corporation be said to be his masters within this act? In the cases cited for the plaintiff,[2] the parties charged with embezzlement stood in the characters of plain and ordinary servants appointed to collect money for, and to pay it over to, their employers, *e.g.*, the party appointed by the overseers to receive money. The parish clerk, who received and misapplied the sacrament money,[3] was held not to be within the statute, because it could not be said whose servant he was, or in whom the right to the money was. But I am of opinion that this plaintiff is not a clerk or servant within the fair meaning of the act; for he filled a distinct office of his own, in respect of which he received money which he was entitled to keep till the year ended, and was not bound to pay over at any time, as a mere clerk or servant would have been."[4] And in the same case was cited also one of an indictment against the accountant of Greenwich hospital: he was held not to be a servant within Stat. 39 Geo. 3, c. 85, which, in its words, expressly comprehends servants of bodies corporate; because he was a sworn officer, not employed as an ordinary servant.[5]

§ 335. Continued — (Friendly Societies). — Again, though in England the treasurer of a friendly society is bound by the statute to account to the trustees in whom the funds of the society are vested, yet, being an officer, whose duties are defined by law and by the rules of the society, the trustees are not his masters or employers, and he is not their servant or clerk. "The treasurer," said Bovill, C. J., "is an accountable officer, but not a servant."[6] Yet a treasurer, if employed by the trustees out-

[1] Ante, § 322.

[2] Rex *v.* Squire, Russ. & Ry. 349, 2 Stark. 349; Rex *v.* Tyers, Russ. & Ry. 402; Rex *v.* Beacall, 1 Moody, 15.

[3] Rex *v.* Burton, 1 Moody, 237. See also Rex *v.* Nettleton, 1 Moody, 259.

[4] Williams *v.* Stott, 3 Tyrw. 688, 1 Cromp. & M. 675. And see Kimball *v.* Boston, 1 Allen, 417.

[5] Anonymous, stated 3 Tyrw. 692.

[6] Reg. *v.* Tyree, Law Rep. 1 C. C. 177 182.

side of his legal duties as treasurer, may thus become their clerk or servant, notwithstanding he is also their treasurer; and, as such, may be guilty of embezzlement within the statute.[1]

§ 336. **Continued — (Officer — Whether Servant, &c.).** — Still it is possible for one to be an officer of a corporation, and at the same time to be the corporation's agent, servant, or clerk, by reason of his office. Thus in England, if, pursuant to a statute, the inhabitants of a parish elect an assistant overseer of the poor and define his duties, and then he is appointed to the office by warrant from two justices of the peace as the statute also directs, and then he appropriates to his own use moneys received by virtue of his office, he may be deemed a servant of the inhabitants of the parish, and, as such, convicted of the embezzlement.[2]

§ 337. **Corporation as Master.** — It is, therefore, no objection that the master or employer of the person indicted as a servant or clerk is, instead of being a private individual, a corporation. Thus, though the former English statute 7 & 8 Geo. 4. c. 29, § 47,[3] does not use this word corporation, yet by construction it extends to the servants of these artificial bodies, the same as of natural persons.[4]

§ 338. **Continued.** — On the other hand, a statute of New York makes it embezzlement "if any clerk or servant of any private person, or of any copartnership (except apprentices and persons within the age of eighteen years), or *if* any officer, agent, clerk, or servant of any incorporated company, shall" commit the forbidden act. And it was held by a majority of the court, that the keeper of a county poorhouse, employed by the superintendent of the poor of the county, is not a servant of any "private person," or of any "incorporated company," within the meaning of this statute, though the superintendent of the poor, his employer, may be deemed an incorporate person. "My impression,"

[1] Reg. *v.* Murphy, 4 Cox C. C. 101. And see the observations on this case in Reg. *v.* Tyree, supra. I think the doctrine of the text may fairly enough be derived from these cases; though, in Reg. *v.* Murphy, the defendant was not in fact treasurer in the sense in which he was such in Reg. *v.* Tyree. See, also, Reg. *v.* Stainer, Law Rep. 1 C. C. 230.

[2] Reg. *v.* Carpenter, Law Rep. 1 C. C. 29.

[3] Ante, § 322.

[4] Williams *v.* Stott, 1 Cromp. & M. 675, 689, 3 Tyrw. 688; Reg. *v.* Townsend, 1 Den. C. C. 167, 2 Car. & K. 168; Reg. *v.* Welch, 2 Car. & K. 296; Archb. New Crim. Proced. 449, 451; Stat. Crimes, § 212; Commonwealth *v.* Wyman, 8 Met. 247; Reg. *v.* Atkinson, Car. & M. 525, 2 Moody, 278; Rex *v.* Hall, 1 Moody, 474.

said Selden, J., "after a careful examination of the subject, is, very decidedly, that the statute was never intended to embrace the agents or servants of any public body, either politic or corporate."[1] This is contracting the statute under a very strong pressure of strict interpretation, — hardly in accordance with the general doctrine.

§ 339. **Illegal Society.** — But where an association of persons was unlawful because of its administering to members an oath made unlawful by statute, some of the judges held, that, for this reason, its servant embezzling its money does not become in law guilty of the offence.[2] Yet if a society, otherwise lawful, has some rules which are against the policy of the law as being in restraint of trade, an officer of it may still commit embezzlement of its funds.[3]

§ 340. **Appointing Power.** — A person may be the servant or clerk of an individual or corporation, though the appointing power is in another.[4] Therefore, —

Letter-Carrier. — One whom a post-mistress employs as a letter-carrier, paying him a weekly salary, to be refunded to her by the post-office, is a person employed in the post-office, within Stat. 52 Geo. 3, c. 143, § 2.[5]

Formal Appointment. — The servant or clerk need not have received a formal appointment in fact, and especially none need be proved, if only he has been permitted to act and has acted as such, and this is shown.[6] Even were he hired in another relation, but served sometimes in this, in which he embezzled the money, it is sufficient.[7]

[1] Coats *v.* People, 22 N. Y. 245, 247. And see Coats *v.* People, 4 Parker, C. C. 662. The report in 22 N. Y. misprints the "if" which I have put in italics, "of."

[2] Reg. *v.* Hunt, 8 Car. & P. 642. See Rex *v.* Hall, 1 Moody, 474; Reg. *v.* Miller, 2 Moody, 249; Rex *v.* Beacall, 1 Car. & P. 454, 457.

[3] Reg. *v.* Stainer, Law Rep. 1 C. C. 230.

[4] Rex *v.* Jenson, 1 Moody, 434; Reg. *v.* Miller, 2 Moody, 249; Reg. *v.* Callahan, 8 Car. & P. 154. See Reg. *v.* Harris, Dears. 344, 25 Eng. L. & Eq. 579, 23 Law J. N. S. M. C. 110, 18 Jur. 408; Reg. *v.* Beaumont, Dears. 270, 24 Eng. L. & Eq. 553.

[5] Rex *v.* Salisbury, 5 Car. & P. 155.

[6] Rex *v.* Rees, 6 Car. & P. 606; Rex *v.* Beacall, 1 Car. & P. 457. And see Reg. *v.* Townsend, Car. & M. 178; Rex *v.* Hall, 1 Moody, 474.

[7] Rex *v.* Barker, Dowl. & Ryl. N. P. 19. **Duties defined.** — In one case, the prisoner was the paid secretary of a building society, whose surplus funds were lent upon mortgage. It was no part of his duty, as defined by the rules, to receive the money when the mortgages were redeemed; but the rules had not been adhered to strictly, and the prisoner had been in the habit of receiving this money, giving in exchange for it receipts previously signed by the trustees. And it was held, that, when he had misappro-

§ 341. **Payment.** — The mode of payment, or, ordinarily, whether the person is to be paid at all or not,[1] has no controlling effect on the question whether he is a servant, clerk, or the like; if only this circumstance does not operate to place him in some relation incompatible with the relation we are considering; as, for instance, to make him a partner.[2] Thus, —

Traveller on Commission. — If he travels to take orders for goods, and the money paid for them, and has a commission on his orders and receipts, instead of a salary, paying out of his receipts his expenses as he goes, he may still be a clerk.[3] But a traveller on commission is not necessarily such.[4] Consequently, in England, if one who has a commission is to take orders or not, as he pleases, and travel when and where he pleases, he is not deemed to be a "servant," because he is not under sufficient control of a master.[5] And for the same reason he appears not to be even a "clerk."[6] But he is an "agent."[7]

priated such money, he was rightly convicted of embezzlement; for he had received it by virtue of his employment as ascertained by the actual course of business. "Although," said Erle, C. J., "he was the secretary, and, as such, had his duties pointed out by the rules, yet he may also have had other duties as clerk to the trustees; and, while the one set of duties would depend on the rules, the other would be ascertained by the actual course of business." Reg. *v.* Hastie, Leigh & C. 269, 274.

[1] See Williams *v.* Stott, stated ante, § 334; Reg. *v.* Smith, 1 Car. & K. 423. The compensation is matter proper to be considered in connection with other circumstances, as in the case of Reg. *v.* Batty, 2 Moody, 257, where it is observed: "The wages made the prisoner a servant." And see Reg. *v.* Hoare, 1 Fost. & F. 647.

[2] See Holme's Case, 2 Lewin, 256; post, § 342, 343.

[3] Rex *v.* Carr, Russ. & Ry. 198; Reg. *v.* Tite, Leigh & C. 29, 8 Cox C. C. 458; Reg. *v.* Bailey, 12 Cox C. C. 56. In the case of Reg. *v.* McDonald, Leigh & C. 85, the prisoner was a cashier and collector to commission agents. He was paid partly by a salary, and partly by a percentage on the profits; but was not to contribute to the losses, and he had no control over the management of the business. And it was held, that he was a servant, within Stat. 7 & 8 Geo. 4, c. 29, § 47 (ante, § 322), and not a partner. Said Pollock, C. B.: "Two men may be partners with respect to third persons, and yet not partners *inter se*. Here the prisoner was a servant to the prosecutors, and had a salary of £150 a year, which was afterwards increased by giving him a percentage on the profits; and it is therefore contended that he was a partner in the business. It is quite clear, that, although there might be a partnership *quoad* third persons, there was none *inter se*, so as to entitle the prisoner to help himself to his masters' property." p. 88.

[4] Reg. *v.* Negus, Law Rep. 2 C. C. 34, 12 Cox C. C. 492.

[5] Reg. *v.* Bowers, Law Rep. 1 C. C. 41.

[6] Reg. *v.* Marshall, 11 Cox C. C. 490. In Reg. *v.* Turner, 11 Cox C. C. 551, 553, Lush, J., said to the jury: "If a person says to another carrying on an independent trade, 'If you get any orders for me I will pay you a commission,' and

[7] Post, § 346.

Right to Mix the Fund. — In Massachusetts, a person employed by the proprietors of a newspaper establishment, to collect bills on commission, was held not to be indictable within the statute, on the ground, however, of his having the right to mix the money collected with his own money.[1]

Stage Driver — Captain of Barge. — One is a servant who drives a stage, and has for his pay the gratuities.[2] And a person whom the owner of a colliery employs, as captain of a barge, to carry out and sell coal, receiving for his compensation two-thirds of the price taken above what would be charged at the colliery, is the owner's servant.[3]

§ 342. **Common Carrier.** — In an English case, the prisoner's only employment was to carry unsewed gloves from a glove manufactory doing business at a certain place to glove-sewers at another place, to take back the gloves when sewed, to receive the money for the work, and to pay it over to the sewers, with a deduction for his charges. The court held, that he was not a servant of the persons defrauded; Coleridge, J., observing: "The ordinary relation of master and servant cannot be said to have subsisted between them: the women [glove-sewers] would not have been responsible for the negligence of the prisoner; and, unless there were decided cases precisely in point, we could not come to the conclusion that he was a servant to them, within the meaning of the statutes against embezzlement. Though some of the decisions go very far in making persons liable as servants to punishment for embezzlement, none go so far as this. The prisoner was in fact a common carrier for all

that person receives money and applies it to his own use, he is not guilty of embezzlement, for he is not a 'clerk or servant;' but, if a man says, 'I employ you and will pay you, not by salary, but by commission,' then the person employed is a servant. And the reason for such distinction is this, — that the person employing has no control over the person employed as in the first case, but where, as in the second instance I have put, one employs another and binds him to use his time and services about his (the employer's) business, then the person employed is subject to control. Here Turner agrees with Mr. Edwards that he shall and will from the date of the agreement 'act as the traveller of the said Richard Edwards, and diligently employ himself in going from town to town. . . . and soliciting orders.' It is, therefore, clear that he was employed as 'clerk or servant' by Mr. Edwards, who had full control over his time and services." And see Reg. *v.* Mayle, 11 Cox C. C. 150; Reg. *v.* Walker, Dears. & B. 600, 8 Cox C. C. 1; Reg. *v.* Thomas, 6 Cox C. C. 403; Reg. *v.* Hoare, 1 Fost. & F. 647.

[1] Commonwealth *v.* Libbey, 11 Met. 64; post, § 370. And see Trafton *v.* United States, 3 Story, 646, 653.

[2] Reg. *v.* White, 8 Car. & P. 742.

[3] Rex *v.* Hartley, Russ. & Ry. 139, cited also in Holme's Case, 2 Lewin, 256.

persons who chose to employ him within a limited district; and he was, like all carriers at common law, only bound to carry such description of goods, and between such places, as he professed to carry." [1]

§ 343. **Part Owner.** — One cannot be a servant to himself; therefore, if a company, of which he is one, is the owner of a business about which he is employed, he cannot be an agent, servant, or clerk of such company.[2] But it may be otherwise if the ownership of the company's effects is vested in trustees.[3]

§ 344. **Female — "His."** — Within the principle that the masculine gender, in a statute, may be extended by interpretation to include the feminine,[4] it was held under 7 & 8 Geo. 4, c. 29, § 47, and 39 Geo. 3, c. 85,[5] that a female may be a servant, though the words are, "receive or take into *his* possession." [6]

§ 345. **More Masters than one — (Firm — Each Partner).** — It has been held, that the servant of a firm is still the servant of the individual partners; to the extent that, if he embezzles the private property of one of them, he is within the statutes.[7] *A fortiori*, he may be the servant of more persons than one, severally employing him at the same time; as in the case of a traveller

[1] Reg. *v.* Gibbs, Dears. 445, 447, 6 Cox C. C. 455, 29 Eng. L. & Eq. 538, 24 Law J. N. S. M. C. 62, 1 Jur. N. S. 118. See The State *v.* Foster, 11 Iowa, 291. **Constable to collect Debts.** — The New York court, under a statute similar to the English, held, that a constable employed to collect debts without suit, if the debtors would pay, and, if not, to procure and serve process, is not a servant of the creditor. People *v.* Allen, 5 Denio, 76. See also on this subject, Rex *v.* Mason, Dowl. & R. N. P. 22; Rex *v.* Barker, Dowl. & R. N. P. 19; Reg. *v.* Glover, Leigh & C. 466; Reg. *v.* Fletcher, Leigh & C. 180; Reg. *v.* Hastie, 1 Leigh & C. 269.

[2] Reg. *v.* Diprose, 11 Cox C. C. 185. **Friendly Society.** — Thus, in Reg. *v.* Bren, Leigh & C. 346, the prisoner was a member of a friendly society, and one of a joint committee appointed by his own and another society to manage an excursion of its members by railway. **Excursion Manager.** — He was nominated by the committee to sell the excursion tickets, which, with the money produced by their sale, belonged to the two societies; and it was his duty to pay over the money taken for the tickets to another person named to receive it, — his services to be rendered without remuneration. And it was held, that he was not a clerk or servant within Stat. 24 & 25 Vict. c. 96, § 68 (ante, § 323); therefore he could not be convicted of embezzling the money taken on sales of the tickets. On the hearing of this case, counsel for the crown referred to Reg. *v.* Proud, Leigh & C. 97, where, it was said, the prisoner who had received money for a friendly society, and embezzled it, was a member of the society, and consequently a joint owner, yet he was convicted. But, said Martin, B., "In that case, the property of the society was vested in trustees."

[3] Reg. *v.* Proud, supra.

[4] Stat. Crimes, § 212.

[5] Ante, § 321, 322.

[6] Rex *v.* Smith, Russ. & Ry. 267.

[7] Rex *v.* Leech, 3 Stark. 70. See Reg. *v.* White, 8 Car. & P. 742.

to collect money for various mercantile houses, who is therefore the servant of each individual house.[1]

§ 346. **Length of Employment — The One Transaction.** — Evidently it is immaterial whether the time for which the servant or clerk is employed be long or short. But there are cases which indicate that the employment must extend beyond the particular transaction.[2] Probably most of these cases are explainable on special circumstances.[3] And where the prisoner, keeping, as drover, some beasts for the prosecutor, was told to take a beast to a particular place, and to bring back the money for which it had been sold, but embezzled the money, the English judges held unanimously that he was rightly convicted, though he had no general authority to receive money, and acted only under instructions for this one instance.[4] It is submitted, that his employment as mere drover could not alter the case; and that, without this element, the conviction was still right.[5] Indeed, the doctrine is now settled, that the employment need not extend beyond the one transaction.[6]

§ 347. **Words "Clerk," "Agent," "Servant," distinguished.** — There is some difference in meaning, known to common use, between the words "clerk," "agent," and "servant;" but the cases on embezzlement seem to employ them almost interchangeably, especially "clerk" and "servant." At all events, we find no distinct lines of partition drawn between these two words;[7] though undoubtedly the pleader would not be allowed, in framing his indictment, to make under all circumstances his own choice of terms. And the allegation must contain a word found

[1] Rex *v.* Leech, supra; Rex *v.* Carr, Russ. & Ry. 198; Reg. *v.* Batty, 2 Moody, 257. In Reg. *v.* Goodbody, 8 Car. & P. 665, Parke, B., expressed a wish to have this question further considered; "as," said he, "I am of opinion that a man cannot be the servant of several persons at the same time, but is rather in the character of an agent." In respect to English authority, the case of Reg. *v.* Batty, decided by all the judges, is of a later date than this; but, aside from authority, it is submitted that the doctrine of our text is clearly correct.

[2] Stat. Crimes, § 271; Rex *v.* Nettleton, 1 Moody, 259.

[3] Post, § 365; Rex *v.* Freeman, 5 Car. & P. 534.

[4] Rex *v.* Hughes, 1 Moody, 370. S. P., where there was only an occasional general employment, and no authority to receive money except in the particular instance, Rex *v.* Spencer, Russ. & Ry. 299. And see Rex *v.* Smith, Russ. & Ry. 516; Reg. *v.* Beaumont, Dears. 270, 24 Eng. L. & Eq. 558.

[5] Archb. New Crim. Proced. 450.

[6] Reg. *v.* Negus, Law Rep. 2 C. C, 34, 36; Reg. *v.* Tongue, Bell C. C. 289, 295; Commonwealth *v.* Foster, 107 Mass. 221; The State *v.* Foster, 37 Iowa, 404.

[7] And see Stat. Crimes, § 326; The Portland *v.* Lewis, 2 S. & R. 197.

in the statute, else it will ordinarily be defective, as violating a well-known rule of criminal pleading.[1]

§ 348. **Continued.** — Between "servant or clerk," however, and "agent," a distinction has been taken, demanding careful attention. Thus, as already observed,[2] it has been held, that a person employed to get orders for goods and receive payment for them, being compensated for his services by a commission on the goods sold, is not the "servant or clerk" of the employer if he is at liberty to get the orders and receive the money where and when he thinks proper. "In order to constitute the relation of master and servant," said Erle, C. J., "the inferior must be under more control than is implied by having the option of getting orders with the right to receive a commission thereon."[3] Yet such a person is undoubtedly an agent. "There is nothing more common," said Cockburn, C. J., in another case, "than for great insurance companies to have 'agents' abroad; as, for instance, in Asia. Can it be contended that a person so employed is a 'clerk or servant?' . . . So every agent would become a clerk or servant."[4]

§ 349. **Some Particular Employments.** — The following enumerations will be helpful: —

Stage-Driver. — A stage-driver is a servant when authorized to act in the particular capacity to which the charge of embezzlement relates.[5]

Treasurer. — So, in England, is the treasurer of the guardians of the poor of Birmingham, appointed under Stat. 1 & 2 Will. 4, c. 67, local and personal, a "servant" of the guardians:[6] and so was one a "clerk and servant," who was employed at a yearly salary, under the appellation of accountant and treasurer to the overseers of a township, his duty being to receive and pay all moneys receivable or payable by them.[7] The treasurer of a railroad corporation is an "officer, agent, clerk, or servant of an incorporated company."[8]

[1] Hamuel *v.* The State, 5 Misso. 260; Budd *v.* The State, 3 Humph. 483.

[2] Ante, § 341.

[3] Reg. *v.* Bowers, Law Rep. 1 C. C. 41.

[4] Reg. *v.* May, Leigh & C. 13.

[5] People *v.* Sherman, 10 Wend. 298; Reg. *v.* White, 8 Car. & P. 742.

[6] Reg. *v.* Welch, 2 Car. & K. 296. See Reg. *v.* Townsend, 1 Den. C. C. 167, 2 Car. & K. 168.

[7] Rex *v.* Squire, 2 Stark. 349, Russ. & Ry. 349. And see Hassinger's Case, 2 Ashm. 287.

[8] Commonwealth *v.* Tuckerman, 10 Gray, 173. As to county treasurer, see The State *v.* Smith, 13 Kan. 274; The State *v.* Clarkson, 59 Misso. 149.

Tax Collector. — A tax collector is a "public officer" within the Maine statute.[1]

Selectman. — A selectman is in New Hampshire a "public officer," and he may be a "receiver of public money."[2]

Deputy Sheriff. — A deputy sheriff is an "officer" within the Texas statute.[3]

Apprentice. — An apprentice is not a servant, authorized by virtue of his apprenticeship, to receive money; but he may be shown to be a servant, in the facts of a particular case.[4]

Traveller, again. — A traveller for a mercantile house may be a "clerk;" he need not live with his employers, or act in their counting-house.[5]

Captain of Barge, again. — And a man may be servant though he goes out as captain of a barge, and has a share of what he receives.[6]

Receiver of Materials to work upon. — But it was held in Massachusetts, that one who receives materials to be made into shoes in his own shop is not the agent of the owner of the materials. "Both were principals in the contract entered into."[7]

§ 350. "**Other Officer.**" — A provision for the punishment of embezzlement committed by any cashier "or other officer" of a bank, has been held to include embezzlement by the president and directors.[8]

§ 351. "**Waterman.**" — A statute of Virginia provides a punishment for "every free waterman who shall receive on board of his boat or other vessel, any produce, goods, wares, or merchandise, and shall embezzle the same or any part thereof, to the value of four dollars and upwards." And the courts hold, that one need not be the captain of the vessel to commit the offence created by this statute.[9]

[1] The State *v.* Walton, 62 Maine, 106. And see Reg. *v.* Graham, 13 Cox C. C. 57.

[2] The State *v.* Boody, 53 N. H. 610.

[3] The State *v.* Brooks, 42 Texas, 62. A State Treasurer is an "officer." People *v.* McKinney, 10 Mich. 54. So is a deputy State treasurer. The State *v.* Brandt, 41 Iowa, 593. So is a School Treasurer. Commonwealth *v.* Morissey, 5 Norris, Pa. 416. See further of the word "officer," The State *v.* Newton, 26 Ohio State, 265; The State *v.* Newton, 28 La. An. 65; Commonwealth *v.* Smith, 111 Mass. 407; Kavanaugh *v.* The State, 41 Ala. 399; Browne *v.* United States, 1 Curt. C. C. 15; Vol. I. § 464.

[4] Rex *v.* Mellish, Russ. & Ry. 80.

[5] Rex *v.* Carr, Russ. & Ry. 198; Reg. *v.* Wilson, 9 Car. & P. 27.

[6] Rex *v.* Hartley, Russ. & Ry. 139; Ante, § 341.

[7] Commonwealth *v.* Young, 9 Gray, 5, 6. And see People *v.* Burr, 41 How Pr. 293.

[8] Commonwealth *v.* Wyman, 8 Met 247.

[9] Smith *v.* Commonwealth, 4 Grat 532.

III. *The Confidence in the Person embezzling.*

§ 352. **Confidence Violated.** — The leading doctrine under this sub-title is, that the statutes are for the protection of employers against the frauds of those in whom they have confided; and, where no confidence is reposed, and none is violated, the offence is not committed.

§ 353. **Illustrations — (What comes to Servant in Course of Duty — By special Direction — Received without Authority).** — Therefore, while, if the thing embezzled came into the servant's hands in the ordinary course of his duty;[1] or if it came, out of the ordinary course, in pursuance of a special direction from the master to receive it;[2] the case, so far as concerns our present inquiry, is within the statutes; yet, if he took it without specific authority, and also the taking was not in the line of his service, the result is otherwise.[3] Even if a servant supposes he is authorized to receive money, while in truth he is not, and under this belief receives and embezzles it, he does not in point of law commit the offence.[4]

§ 354. **Money to which Master not entitled.** — But if authorized in fact by the master, he cannot defend himself by showing that the latter had no right to the money: as, that the person by whom it was paid in answer to a claim of right did not owe it,[5] or that the master became a wrong-doer in causing the servant to receive it.[6] The question of what circumstances will bring a case within the principles of this section and the last is best considered under our next sub-title.

§ 355. **Overpaying Deposit.** — The special terms of some of the statutes, to be explained under our next sub-title, have, in some of the cases, aided the courts in coming to the results above

[1] People *v.* Sherman, 10 Wend. 298; Reg. *v.* White, 8 Car. & P. 742; Reg. *v.* Townsend, Car. & M. 178; Reg. *v.* Masters, 3 New Sess. Cas. 326, 12 Jur. 942, 1 Den. C. C. 332, 2 Car. & K. 930, Temp. & M. 1; People *v.* Hennessey, 15 Wend. 147.

[2] Rex *v.* Smith, Russ. & Ry. 516; People *v.* Dalton, 15 Wend. 581; Rex *v.* Hughes, 1 Moody, 370; Rex *v.* Spencer, Russ. & Ry. 299.

[3] Rex *v.* Mellish, Russ. & Ry. 80; Rex *v.* Salisbury, 5 Car. & P. 155; Reg. *v.* Wilson, 9 Car. & P. 27; Rex *v.* Hawtin, 7 Car. & P. 281; Rex *v.* Prince, 2 Car. & P. 517; Rex *v.* Thorley, 1 Moody, 343; Rex *v.* Snowley, 4 Car. & P. 390; Reg. *v.* Arman, Dears. 575; Reg. *v.* May, Leigh & C. 13, 8 Cox C. C. 421. See Rex *v.* Beacall, 1 Car. & P. 310.

[4] Rex *v.* Hawtin, 7 Car. & P. 281. And see Vol. I. § 438–441.

[5] Reg. *v.* Adey, 19 Law J. N. S. M. C. 149, Archb. New Crim. Proced. 453.

[6] Rex *v.* Beacall, 1 Car. & P. 454, 457

stated. But, aside from such terms, the like doctrines appear to flow from the obvious purpose of these enactments, and the nature of the offence. Thus, in Massachusetts, there was the following simple provision: "If any person to whom any money, goods, or other property, which may be the subject of larceny, shall have been delivered, shall embezzle or fraudulently convert to his own use, or shall secrete, with intent to embezzle or fraudulently convert to his own use, such money, goods, or property, or any part thereof, he shall be deemed by so doing to have committed the crime of simple larceny."[1] And it was held, that, when the cashier of a savings-bank, mistaking the sum due a depositor who was withdrawing his deposit, paid him a hundred dollars too much, the latter, by fraudulently converting to his own use this overpay, did not commit the statutory offence; because, though the terms of the statute are broad, the court deemed it applicable only where there is a trust or confidence reposed in one who, when he commits the wrongful act, abuses the confidence or trust.[2]

IV. *The Thing embezzled.*

§ 356. **General Doctrine.** — As this offence of embezzlement can be committed only by the classes of persons whom the statutes designate,[3] so also it can be committed only of such things as are within the statutory terms. There are, in the statutes, many differing forms of expression to indicate the thing. Thus, —

Subject of Larceny. — By some of the statutes, whatever is the subject of larceny is likewise the subject of embezzlement. Now, since all statutory provisions, and the statutes and common law, are to be construed together,[4] it follows that this expression, when employed, embraces both those things which are subjects of larceny at the common law, and those which are made subjects of larceny by statute.[5] Again, —

Specific Terms. — Some of the statutes employ such terms as "money," "goods and chattels," "effects," and the like. The meaning of these various terms is considered in the work on

[1] Mass. Stats. 1857, c. 233.

[2] Commonwealth *v.* Hays, 14 Gray, 62.

[3] Ante, § 331.

[4] Stat. Crimes, § 82, 86–90, 128.

[5] And see The State *v.* Stoller, 38 Iowa, 321.

Statutory Crimes; but a few explanatory words may be useful here.

§ 357. **Money.** — "Money" means, as a general proposition, what is legal tender, and nothing else.[1] The word may, perhaps, be pressed beyond this meaning by the particular frame of the statute in which it occurs.

§ 357 *a*. **Property.** — "Property" is a word quite flexible in meaning, and it is very broad in some connections.[2] A statute making indictable the embezzlement of "any money or property of another" includes promissory notes, bills of exchange, and other "property" of the like sort.[3]

§ 358. **Goods and Chattels.** — Though, in the large sense, these words mean any subject of property other than real estate, yet, in statutes like those under consideration, they are greatly restricted, — precisely how much, it is not easy to state. As a general rule, they include neither money nor *choses in action*. Yet, on this subject, the reader should carefully consult the fuller elucidations in "Statutory Crimes."[4]

§ 359. **Effects.** — The word "effects," sometimes found in these statutes, is broader in meaning than any of the foregoing, except "property;" but its precise limits cannot well be defined, and they probably differ in different statutes. It does not ordinarily include real estate, but it may include every sort of personal thing of value, even a thing the value of which is not fixed, or indeed ascertainable.[5]

§ 360. "*By virtue of his employment*": —

Effect of these Words. — The doctrine stated under our last sub-title seems to have been drawn, as already observed,[6] from general principles relating to this offence, without special consideration of the particular phraseology of the statute. Still it has been seen in these pages, that the former English provisions contain the words, "by virtue of his employment, receive or take into his possession;"[7] and most of the American ones copy substantially this language. The present English statute is different.[8] Before any thing can be embezzled, therefore, it must

[1] Stat. Crimes, § 217, 346.
[2] 2 Bishop Mar. Women, § 75–77.
[3] The State *v.* Orwig, 24 Iowa, 102.
[4] Stat. Crimes, § 344, 345; Rex *v.* Mead, 4 Car. & P. 535.
[5] Bouv. Law Dict. Effects; Rex *v.* Bakewell, 2 Leach, 4th ed. 943, Russ. & Ry. 35; Rex *v.* Aslett, 1 New Rep. 1, 2 Leach, 4th ed. 954, 958, Russ. & Ry. 67.
[6] Ante, § 355.
[7] Ante, § 321, 322.
[8] Ante, § 323 and note.

come into the hands of the servant, and, when this language is found in the statute, however the rule may be when it is not, it must come by virtue of his employment.

§ 361. **Agent taking too little.** — Concerning what comes to the servant by virtue of the employment, Parke, J., in a *nisi prius* case, carried the doctrine to the verge, if not beyond it, when, after conferring with Littledale, J., he held, that the defendant could not be convicted, because, while his business was to lead a stallion under orders to charge and receive not over 30*s.* nor less than 20*s.* a mare, he contracted, in this particular instance, to take, and took, only 6*s.*, which he embezzled.[1] In a later *nisi prius* case, Patteson, J., being hardly inclined to yield to the doctrine of this decision, directed, after conference with Parke, B., a conviction where the defendant, a drayman, was sent out by a brewer with porter to sell at only fixed prices, yet sold some at an under rate, without taking the money then, but, before he took it, the brewer privately told the purchaser to pay the drayman the amount, which the latter embezzled. "As the master," said the judge, "in the present case had authorized the customer to make payment to the prisoner, the master was bound by that payment, and could not demand more of the customer."[2]

Not in Line of Duty. — And where the business of a clerk was to receive, in-doors, money which out-door collectors got from customers, yet in one instance he took a sum directly from a customer out of doors, and embezzled it, all the judges held him to have committed the statutory offence.[3] So, in California, the court, declining to follow the English case relating to the stallion, held, that, if an agent obtains the money of his principal in the capacity of agent, but still in a manner in which he was not authorized by his agency to receive it, he may commit the crime of embezzling this money.[4]

§ 362. **Miller departing from Duty.** — On the other hand, where the duty of a miller in a county jail required him to grind the grain delivered him with a ticket from the porter, yet he received a quantity without such ticket, and embezzled the money paid

[1] Rex *v.* Snowley, 4 Car. & P. 390.
[2] Reg. *v.* Aston, 2 Car. & K. 415.
[3] Rex *v.* Beechey, Russ. & Ry. 319. And see Reg. *v.* Wilson, 9 Car. & P. 27; Rex *v.* Salisbury, 5 Car. & P. 155; Rex *v.* Williams, 6 Car. & P. 626.
[4] Ex parte Hedley, 31 Cal. 108. And see post, § 363, 364.

for the grinding, he was adjudged not to be within the statute. "The reasonable conclusion to be drawn from his receiving and grinding the grain without a ticket," said Pollock, C. B., "is, that he intended to make an improper use of the machinery intrusted to him, by using it, not for the benefit of his masters, but for the benefit of himself. We think, therefore, that the money which he received was not received on account of his masters, and that he cannot be said to be guilty of embezzlement." [1]

§ 363. **How in Principle.** — If, in the case last stated, it was understood between the miller and his customer that the former was grinding the grain on his own account, this circumstance would plainly, in principle, justify the conclusion to which the court arrived.[2] But, in the absence of any such understanding, where in fact the miller received the money "by virtue of his employment," as the statute expresses it, and the customer would not have paid it to him otherwise, it is a novelty in the law to hold that, because he departed from his duty in not requiring a ticket before grinding, therefore, having committed a wrong in addition to the statutory one, he is to escape punishment for the latter. A case of embezzlement not only may, but must, show a departure by the servant from the line of his duty. And it is contrary to the entire spirit of our law, as well in the criminal department as the civil, to permit a man to set up his own wrong in justification or evasion of any charge against him; or, in this instance, to say, that, because he added another wrong to the one inhibited by the statute, therefore he should escape all punishment. In like manner, where the servant let his master's stallion at a price below the limit fixed by the latter, he still, in fact, received the smaller sum "by virtue of his employment;" and, in principle, he should have been punished for the embezzlement.

§ 364. **Continued — Servant in own Wrong.** — But it is said, that, if one receives a thing contrary to his duties as servant or clerk, he is, therefore, not a servant or clerk in the particular transaction. Is this correct? May not a man be a clerk or ser-

[1] Reg. *v.* Harris, Dears. 344, 352, 25 Eng. L. & Eq. 579, 6 Cox C. C. 363, 23 Law J. N. S. M. C. 110, 18 Jur. 408. See also Reg. *v.* Goodenough, Dears. 210, 25 Eng. L. & Eq. 572; Reg. *v.* Cullum, Law Rep. 2 C. C. 28, 12 Cox C. C. 469; Reg. *v.* Christian, Law Rep. 2 C. C. 94, 12 Cox C. C. 502.

[2] Reg. *v.* Cullum, Law Rep. 2 C. C. 28, 12 Cox C. C. 469.

vant while disobeying orders? In civil jurisprudence he often is, and the master or employer is held responsible for his acts. This leads us to a still broader view of the subject; a view, however, which unfortunately is not quite in accord with the adjudications. In reason, whenever a man claims to be a servant while getting into his possession by force of this claim the property to be embezzled, he should be held to be such on his trial for the embezzlement. This proposition is not made without considering what may be said against it. And a most natural objection to it is, that, when a statute creates an offence which by its words can be committed only by a "servant," an extension of its penalties to one who is not a servant, but only claims to be such, violates the sound rule of statutory interpretation whereby the words, taken against defendants, must be construed strictly. But why should not the rule of estoppel, known throughout the entire civil department of our jurisprudence, apply equally in the criminal? If it is applied here, then it settles the question; for, by it, when a man has received a thing of another under the claim of agency, he cannot turn round and tell the principal, asking for the thing, "Sir, I was not your agent in taking it, but a deceiver and a scoundrel." When, therefore, the principal calls the man under these circumstances to account, the man is estopped to deny the agency he professed, — why, also, if he is then indicted for not accounting, should he not be equally estopped on his trial upon the indictment?[1]

§ 365. *As to the Master's Possession:* —

Must come to Servant from Third Person. — Another proposition is, that the money or other thing must not come into the master's possession before it does into the servant's;[2] for, if it does, the taking of it, whether delivered to the servant by the master or not, is larceny;[3] but it must come directly (we have seen,[4] in

[1] And see Ex parte Hedley, 31 Cal. 108, 113. This doctrine would appear to have been distinctly followed in Ex parte Ricord, 11 Nev. 287.

[2] Reg. *v.* Hayward, 1 Car. & K. 518.

[3] Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den C. C. 14, Temp. & M. 342; Reg. *v.* Hawkins, 1 Den. C. C. 584, Temp. & M. 328, 1 Eng. L. & Eq. 547; Rex *v.* Metcalf, 1 Moody, 433; Rex *v.* Hammon, Russ. & Ry. 221; Reg. *v.* Heath, 2 Moody, 33; Rex *v.* Paradice, 2 East P. C. 565; United States *v.* Clew, 4 Wash. C. C. 700; Reg. *v.* Smith, 1 Car. & K. 423; Rex *v.* Murray, 1 Moody, 276; Rex *v.* Bass, 1 Leach, 4th ed. 251, 2 East P. C. 566; Rex *v.* Chipchase, 2 Leach, 4th ed. 699, 2 East P. C. 567; Rex *v.* Murray, 1

[4] Ante, § 353–355, 360.

the course of the servant's employment) from a third person, and not from the master.[1] Still, if a master, to try his servant's honesty, gives money to a third person, who, with it, makes a purchase of the servant, the latter may be convicted of embezzling this money.[2]

§ 366. **Why? — How in Reason — New York Doctrine.** — The reason assigned for this doctrine is, that, since the chief object of these statutes of embezzlement was to meet a defect in the law of larceny, which requires a trespass, and consequently it is not larceny for a servant to appropriate to his own use what he rightfully receives from a third person, their spirit and purpose are fully responded to when they are restricted in interpretation to those circumstances in which a larceny could not, in point of law, be committed. Still the question arises, Why so restrict them? Why not, at least, suffer them to cover any case of an admitted criminal sort, not covered by the law of larceny, if the facts of the case come completely and exactly within their words? The New York court refused to follow the English interpretation; making a departure, it is submitted, in the right direction. Thus, where a traveller at an inn had delivered, for deposit in the post-office, a letter containing money, to the person having charge of the inn, and the latter had passed it to the barkeeper, who was accustomed to convey letters to and from the post-office, — the court held, that the bar-keeper, embezzling the money, was indictable under the statute. And Cowen, J., delivering the opinion, went so far as to say, — contrary to the doctrine of the last section, — that "the offence as proved is

Leach, 4th ed. 344, 2 East P. C. 683; Rex *v.* Stock, 1 Moody, 87; Rex *v.* Beaman, Car. & M. 595; Reg. *v.* Goode, Car. & M. 582; Reg. *v.* Jackson, 2 Moody, 32; Rex *v.* Abrahat, 2 Leach, 4th ed. 824, 2 East P. C. 569; Reg. *v.* Evans, Car. & M. 632; Rex *v.* Robinson, 2 East P. C. 565; Gill *v.* Bright, 6 T. B. Monr. 130; Reg. *v.* Wilson, 9 Car. & P. 27; Reg. *v.* Hayward, 1 Car. & K. 518. See Rex *v.* Walsh, 4 Taunt. 258, 2 Leach, 4th ed. 1054, Russ. & Ry. 215; Reg. *v.* Butler, 2 Car. & K. 340; Rex *v.* Bakewell, 2 Leach, 4th ed. 943.

[1] Reg. *v.* Hawkins, 1 Den. C. C. 584, Temp. & M. 328, 1 Eng. L. & Eq. 547; United States *v.* Clew, 4 Wash. C. C. 700; Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14, 4 Cox C. C. 336, Temp. & M. 342; Rex *v.* Freeman, 5 Car. & P. 534; Reg. *v.* Smith, 1 Car. & K. 423; Rex *v.* White, 4 Car. & P. 46; Reg. *v.* Masters, 3 New Sess. Cas. 326, 12 Jur. 942, 1 Den. C. C. 332, Temp. & M. 1, 2 Car. & K. 930; Rex *v.* Murray, 1 Moody, 276; Peck's Case, 2 Russ. Crimes, 3d Eng. ed. 180. And see Rex *v.* Smith, Russ & Ry. 267.

[2] Rex *v.* Whittingham, 2 Leach, 4th ed. 912; Rex *v.* Headge, 2 Leach, 4th ed. 1033, Russ. & Ry. 160; Reg. *v.* Gill, Dears. 289, 6 Cox C. C. 295, 24 Eng. L. & Eq. 550, 23 Law J. N. S. M. C. 50, 18 Jur. 70.

exactly within the statute. It is intended to provide for a fraudulent conversion of money or goods by a servant, when they are delivered to him as such, either by his master or mistress, or, in their behalf, by a stranger. That was but a breach of trust at common law, because the money or goods came to his hands by delivery. The statute intended to convert such a breach of trust into a crime."[1] In a previous case, Savage, C. J., said: "The very term 'embezzlement' is peculiarly applicable to a fraudulent appropriation made by a servant of goods intrusted to him by his master."[2] This interpretation gives to these statutes a much wider range than the English; and, in reason, it ought to be followed generally in this country. It cannot, however, fully prevail in a State in which there can be no conviction for embezzlement on facts which constitute a larceny.[3]

§ 367. **Continued — Alabama Doctrine.** — The Alabama court has held, that the fraudulent appropriation by a clerk, of a bill of exchange, which, having come into the possession of the employer, comes thence into the clerk's by virtue of his employment, is, under the statute of the State, embezzlement. And Stone, J., justified both the English and the differing Alabama and New York doctrine, as follows: "The words in the English statutes, 'for, or in the name or on account of, his master,' show clearly that the money, goods, &c., to come within those statutes, must have been taken or received from some person other than the master and employer. To say that a clerk received or took goods, &c., from his employer, 'for,' or 'in the name,' or 'on the account,' of said employer, would be a palpable solecism. We think the English decisions upon their statutes are manifestly

[1] People *v.* Dalton, 15 Wend. 581, 583. This New York statute — which the reader may like to compare with the English, ante, § 321–323 — is, "If any clerk or servant of any private person, or of any copartnership (except apprentices and persons within the age of eighteen years), or if any officer, agent, clerk, or servant of any incorporated company, shall embezzle or convert to his own use, or take, make way with, or secrete, with intent to embezzle or convert to his own use, without the assent of his master or employers, any money, goods, rights in action, or other valuable security or effects whatever belonging to any other person, which shall have come into his possession or under his care by virtue of such employment or office, he shall, upon conviction, be punished in the manner prescribed by law for feloniously stealing property of the value of the articles so embezzled, taken, or secreted, or of the value of any sum of money payable and due upon any right in action so embezzled." 2 R. S. 678, § 59. See ante, § 338 and note.

[2] People *v.* Hennessey, 15 Wend. 147 151.

[3] See ante, § 328, 329.

correct. Our statute (Code, § 3143) contains no such clause as that copied and commented on above. Its language is, 'Any officer, agent, or clerk of any incorporated company, or clerk or agent of any private person or copartnership, except apprentices and other persons under the age of eighteen years, who embezzles, or fraudulently converts to his own use, any property of another, which has come into his possession by virtue of his employment, must, on conviction, be punished as if he had feloniously stolen such property.' This section is much more comprehensive in its terms than either of the English statutes. It embraces and provides punishment for every case of embezzlement of property of another, which has come into the possession of the clerk or agent 'by virtue of his employment.' The bill of exchange mentioned in the record was the 'property of another,' and it went into the possession of the prisoner 'by virtue of his employment' as clerk. The case is within the very letter of the statute." [1]

[1] Lowenthal *v.* The State, 32 Ala. 589, 595. This Alabama statute is substantially the same as the New York one. The words in the English statute, referred to by this learned judge as justifying the doctrine of the English courts, do not seem to me to have, by a just interpretation, this effect. If a servant receives money from the hands of his master, with a special direction to pay it over to a third person, it comes to him, it seems to me, "on account of his master," as truly as if a third person paid it to him. He must "account" for it to his master the same as though it came from a third person, and his relations to his master in respect of it are at all points the same. **Massachusetts.** — In Massachusetts, there are the following two statutory provisions: "Whoever embezzles, or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently convert to his own use, money, goods, or property, delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of simple larceny." Gen. Stats. c. 161, § 35. "If a carrier or other person to whom any property which may be the subject of larceny has been delivered to be carried for hire, or if any other person intrusted with such property, embezzles, or fraudulently converts to his own use, or secretes with intent so to do, any such property, either in the mass or as the same was delivered, or otherwise, and before the delivery thereof at the place at which, or to the person to whom, it was to be delivered, he shall be deemed to be guilty of simple larceny." Ib. § 41. A servant was, by one member of a firm, intrusted with money to carry to another member; but, instead of executing his trust, he converted it to his own use. Thereupon he was indicted as for embezzlement under the latter of the two sections above quoted, as the bill of exceptions states, or, as the court observed, the indictment might be deemed to be on either section. It was, as the case stands in the published report, in special form, as for embezzlement. But the court held, that the offence was larceny at the common law; and, as a consequence, decided that this indictment could not be maintained. The learned judge, who delivered the opinion, relied on the doctrines of the English courts, as stated in our text, and did not advert to the difference between the English and Massachusetts statutes. I cannot discover that the Alabama case was be

§ 367 *a*. **Continued — Other States — Other Views.** — The defect in the English interpretations is, in England,[1] and in some of our States besides New York and Alabama, in some measure corrected,

fore the court, but the New York cases were. As to the latter, it was observed: "In People *v.* Hennessey, 15 Wend. 147, the money embezzled by the defendant had never come into the possession of his master. And in People *v.* Dalton, 15 Wend. 581, the possession of the defendant was that of a bailee." Commonwealth *v.* Berry, 99 Mass. 428, 430. Now, it will be instructive to explore this case a little further. **Concerning Reporting.** — Mr. Browne, who at this time was reporter of the Massachusetts decisions, has, at considerable trouble and some expense to himself, preserved all the briefs and other papers pertaining to each case reported by him, and from time to time presented them to the "Social Law Library" in Boston. There, nicely arranged and bound in volumes, they are accessible to all who visit the library. I cannot but pause to say, that not only the bench and bar of Massachusetts owe him a debt of gratitude; but, if this "new idea," or "Yankee notion," should gain currency elsewhere, he should be honored as the leader of a very important reform. **Form of Indictment.** — Turning to this collection of papers, I find that the indictment in this case of Berry ran as follows: "That Charles O. Berry, of, &c., on, &c., at, &c., did embezzle and fraudulently convert to his own use one hundred bank-bills each thereof being of the denomination and value of one dollar, one hundred bank-bills each thereof being of the denomination and value of two dollars, one hundred promissory notes of the United States each thereof being of the denomination and value of one dollar, five bank-bills each thereof being of the denomination and value of twenty dollars, divers other bank-bills and promissory notes of the value of seven hundred and twenty-six dollars, and a more particular description of which is to the said jurors unknown, the said bank-bills and notes being then and there the subject of larceny, and the said bank-bills and notes being the property, money, goods, and chattels of, &c., and the said bills and notes having theretofore, to wit, on, &c., been there delivered to the said Charles O. Berry by one Edward Wyman in the trust and confidence and with the direction that the said Berry would and should deliver the said bills and notes and each thereof to one Daniel Shales, and the said bank-bills and notes and each thereof having been then and there received by the said Berry in the said trust and confidence and with the said direction; whereby and by force of the statute in such case made and provided, the said Berry is deemed to have committed the crime of simple larceny: and so the jurors aforesaid, upon their oath aforesaid, do say that the said Berry then and there, in manner and form aforesaid, the said, of the property and moneys of the said, &c., feloniously did steal, take, and carry away; against the peace of the said Commonwealth, and contrary to the form of the statute in such case made and provided." **The Pleading discussed.** — Now, the reader perceives, that, rejecting the conclusion "against the form of the statute" as surplusage (Crim. Proced. I. § 601), and rejecting as surplusage the parts which charge embezzlement, if they can be so rejected, there is left a good indictment for larceny at the common law. As to the question whether the parts charging embezzlement can be rejected as surplusage, the rule applicable in a case like this is, that, if the indictment itself is good as for embezzlement, the embezzlement part cannot be so rejected, but, if it is insufficient as such, this part can be rejected. Crim. Proced. I. § 480, 483. Now, turning to the report of this case, we read: "The statutes creating that crime [embezzlement] were all devised for the purpose of punishing the

[1] Reg. *v.* Cooper, Law Rep. 2 C. C. 123, 12 Cox C. C. 600.

or even removed, by other statutes, or by judicial construction. Though the question is important, it is best left to the individual inquiries of practitioners into the special doctrines and enactments of their own States.[1]

§ 368. **Goods in Transit to Master.** — When, to return to the English doctrines, the goods have left the possession of the third person, being in the custody of the new owner's servant, who has them in transit to his master, a second servant, through whose hands they must pass in the regular course of business, may commit embezzlement of them.[2] But this happens only in cases where they are not deemed to have reached, in coming to the first servant, their —

Ultimate Destination. — If they have reached their ultimate destination, though in the hands of a servant, his possession is the master's, and it is too late to commit embezzlement of them. Thus, —

Servant's Duty to keep. — Where the clerk of an insurance company took from the hands of the messenger a cancelled check which the latter had received at the bank, and his duty required him to keep the check for the directors, he was held to have committed, not embezzlement of it, but larceny, in afterward

fraudulent and felonious appropriation of property which had been intrusted to the person, by whom it was converted to his own use, in such a manner that the possession of the owner was not violated [by the act of misusing it], so that he could not be convicted of larceny for appropriating it," p. 429. But the allegations in the indictment, it is seen, do not bring the case within this doctrine. They accord with the facts as actually proved, but do not come up to the facts which, the court say, must be proved to show embezzlement. Therefore they are insufficient as a charge of embezzlement, and may be rejected as surplusage, and the indictment remains good as for a simple larceny. On it, as such, if the view of the court was sound, the conviction, as for larceny, should have been sustained. But, it may be said, the indictment fills the words of the statute. That makes no difference, where the statute is bent by construction; for, in such a case, it is not sufficient to follow the statutory words. Crim. Proced. I. § 624 et seq. **Same Act as Embezzlement and Larceny.** — This brings us back to the inquiry, whether it is a sound rule of interpretation which thus tampers with the statutory terms. The statute declares, that, if one does so and so, his act shall be deemed simple larceny. Now, suppose the words are broad enough to embrace some things which were simple larceny before: are these things, in reason, less within the statute than those which were not larceny before? I can see no reason whatever for the distinction. To make it is to violate analogies running through the entire field of the criminal law, and the entire field of the law of statutory interpretation. And see ante, § 328, 329.

[1] See The State *v.* Healy, 48 Misso. 531; Barclay *v.* Breckinridge, 4 Met. Ky. 374; The State *v.* Fann, 65 N. C. 317.

[2] Reg. *v.* Masters, 1 Den. C. C. 332, 2 Car. & K. 930, Temp. & M. 1. 3 New Sess. Cas. 326.

abstracting it from its place of deposit; this place being deemed its ultimate destination.[1]

Received from Fellow-servant. — And where a clerk receives of another clerk the master's money to be applied to a particular purpose, such receipt is the same as if direct from the master, therefore the embezzlement of the money is not within the statutes.[2]

To procure Change. — Where one was handed a check, and was to have sixpence for getting it cashed at a banker's, he was held, by Parke, J., on conferring with Taunton, J., in a *nisi prius* case, not to be guilty of embezzlement.[3] On the other hand, where a servant, sent with a bank-note for the change, embezzled a part of the change, the judges decided that he could not be convicted of larceny, and intimated that he could be of embezzlement.[4]

§ 369. *Remaining Questions:* —

Ownership. — In a New York case, under a statute[5] worded somewhat differently from the English one of 7 & 8 Geo. 4, c. 29, § 47, as concerns the point to be stated, the defendant claimed that the goods embezzled must belong to a person other than the master; but the court held, that they need only be the goods of some person other than the servant.[6] This question could not arise in England, where they must at least be received on account of the master;[7] but, everywhere, even without reference to the statute, they must, on common-law principles, not be the servant's,[8] or even the goods of a firm in which the supposed servant is a partner.[9]

§ 370. **Right to mix the Fund — (Auctioneer — Collector on Commissions, &c.).** — Therefore the Massachusetts court decided, that an auctioneer cannot be convicted for embezzling the proceeds of his sales;[10] neither can the collector of bills on commission for a newspaper, by appropriating the money to himself;[11] because both the auctioneer and the collector have the right to mix such funds with their own, simply holding themselves indebted to

[1] Reg. *v.* Watts, 2 Den. C. C. 14, 1 Eng. L. & Eq. 558.
[2] Rex *v.* Murray, 1 Moody, 276.
[3] Rex *v.* Freeman, 5 Car. & P. 534. And see Rex *v.* White, 4 Car. & P. 46.
[4] Rex *v.* Sullens, 1 Moody, 129.
[5] Ante, § 366, note.
[6] People *v.* Hennessey, 15 Wend. 147.
[7] See the statute, ante, § 322.
[8] And see Reg. *v.* Townsend, 1 Den. C. C. 167, 2 Car. & K. 168; Rex *v.* Hall, 1 Moody, 474; Reg. *v.* Hunt, 8 Car. & P. 642; Reg *v.* Miller, 2 Moody, 249.
[9] Ante, § 341.
[10] Commonwealth *v.* Stearns, 2 Met. 343.
[11] Commonwealth *v.* Libbey, 11 Met. 64.

their employer for the amount due him. Yet we have seen,[1] that the fact of the servant's being paid a commission or percentage, instead of a salary, is not conclusive against his power to commit embezzlement. In such a case, the reader perceives, the money comes to the servant's hands already mixed; that is, the part which is commissions belongs to the servant, while the rest is the master's. And it is not clear that all courts will follow the Massachusetts doctrine.[2] "With respect to money," the English judges observed in one case,[3] "it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pay them away." And in the case before referred to,[4] where the captain of a barge was paid, for taking out and selling coals, two-thirds of the sum he got for them above what would have been charged at the mine, the court overruled the objection that the money which the servant received was in part his own: observing, "As to the price at which the coals were charged at the colliery in this instance, namely, fourteen shillings per chaldron, that sum the prisoner received solely on his master's account, as his servant, and by embezzling it became guilty," &c.[5] So where a servant, paid according to what he did, was to get orders for jobs, do them out of his master's materials, receive from customers the price of the manufactured articles, then carry it to his master, and, at the end of the week, have out of it the proportion agreed upon for his work, — embezzled the sum received for a particular article, one-third of which sum was to be his for his work, — the judges held that he was rightly convicted of embezzling the whole.[6] In Massachusetts, if, under a special contract, a broker, for example, is without authority to mix the money with his own, it may be the subject of embezzlement by him.[7]

§ 371. **Continued — How in Legal Reason.** — When a thing of a nature to be embezzled has come into the hands of the servant,

[1] Ante, § 341; Rex *v.* Carr, Russ. & Ry. 198.

[2] Various English cases furnished scope for this Massachusetts doctrine, yet the objection was not taken. See, for example, Reg. *v.* Bailey, 12 Cox C. C. 56. And see and compare Reg. *v.* Hall, 13 Cox C. C. 49; The State *v.* Kent, 22 Minn. 41; Reg. *v.* Brownlow, 14 Cox C. C. 216.

[3] Rex *v.* Taylor, 3 B. & P. 596, 2 Leach, 4th ed. 974, Russ. & Ry. 63.

[4] Ante, § 341.

[5] Rex *v.* Hartley, Russ. & Ry. 139. See also Reg. *v.* Atkinson, Car. & M. 525, 2 Moody, 278; Rex *v.* Hall, Russ. & Ry. 463, 3 Stark. 67.

[6] Rex *v.* Hoggins, Russ. & Ry. 145.

[7] Commonwealth *v.* Foster, 107 Mass. 221; Commonwealth *v.* Smith, 129 Mass. 104.

he is in reason to be held guilty of embezzling it, in all circumstances which show a malicious intent to appropriate it to himself. Suppose, for instance, he has the right to mix it with his own property, and does mix it, with the intent thereby to embezzle it, — why let him escape on the ground, that his act alone was no violation of duty, but only his act coupled with his intent? Many criminal acts are such only because of the intent with which they are done. But suppose, in these circumstances, the intent to embezzle arose after the mixing, — for instance, arose after the money was deposited by the servant to swell his own account in a bank, — could he then be held for the embezzlement? Before this question is answered, let us observe, that, if the servant had no right so to deposit the money, yet deposited it without the evil intent, his case would necessarily be merely the same as when he had deposited it with right. Does, then, this act of mixing by the servant stand in reason against the possibility of his committing the offence of embezzlement afterward? Plainly, an inability arising afterward to pay over the money would not constitute embezzlement. He must have the criminal intent. But if he has this intent, and, in pursuance thereof, not in consequence of any inability, refuses, he certainly commits in the eye of morals the offence, — in the eye of ordinary reason, also, — precisely as if he had not made the deposit, or otherwise mixed the fund. The legal difficulty is to know, and state in the indictment, what particular coin or bank-notes he embezzles. And this difficulty merely runs the question into one of pleading. Now, this question of pleading is not for discussion here, only we may observe, that a court departs from its duty when it does not allow some form of pleading to cover every form of offence known in the law.[1] We conclude, therefore, that embezzlement may in reason be committed under the circumstances mentioned in this section, and that those courts which have determined otherwise have erred.

[1] See Crim. Proced. I. § 493 et seq.; II. § 316–323. According to a Massachusetts case, if money of a railroad corporation is received by their treasurer, who deposits it as treasurer, and then draws it out in bills or coin, the bills or coin are the property of the corporation subject to embezzlement by him. And if, when he draws the money, he does not mean to embezzle it, he may do it afterward on the evil intent coming over him; even though, at the time of the fraudulent conversion, he intends to restore the amount, and has property sufficient to secure its restoration. Commonwealth *v.* Tuckerman, 10 Gray, 173

V. *The Act by which the Embezzlement is effected.*

§ 372. **Compared with Larceny.** — We have seen that, according to the English and possibly the more prevalent American doctrine, the thing to be embezzled must not come to the servant from the master or his possession, but the former must receive it from a third person for the master.[1] And the question now is, by what act, after it is received, does the servant commit the embezzlement. There is always, in all departments of jurisprudence, civil and criminal, a distinction between an act and the evidence of it; and our present inquiry concerns the act, not the evidence. But, on this question, we find little light in the authorities; still we may infer from them, and from the reason of the law, that, if the servant does with the property under his control what one must intend to do with property taken to commit larceny of it, he embezzles it, while nothing short of this is sufficient.[2]

§ 373. **Illustrations — (Pledging — Absconding — Not accounting, &c.).** — For example, if the servant, instead of delivering the property to his master or another, as his duty requires him to do, pledges it for his own debt,[3] or runs away with it,[4] or neglects or refuses to account for it,[5] or otherwise wrongfully diverts its course toward its destination to make it his own,[6] he embezzles it. Yet much of even this is to be deemed rather as evidence than as the offence itself. For, to constitute the offence, it is not necessary there should be a demand for the money alleged to be embezzled, or a denial of its receipt, or any false account, or false statement, or false entry, or refusal to account.[7]

§ 374. **Illustrations from Indictment, &c.** — For illustration: on common-law principles, the indictment under the statute must set out specifically some article of the property embezzled; an allegation that the prisoner "took and received, on account of his master, divers sums of money, amounting in the whole to

[1] Ante, § 365.

[2] And see Ex parte Hedley, 31 Cal. 108; Commonwealth v. Shepard, 1 Allen, 575; Kibs v. People, 81 Ill. 599; Commonwealth v. Gateley, 126 Mass. 52.

[3] Commonwealth v. Butterick, 100 Mass. 1.

[4] Commonwealth v. Berry, 99 Mass. 428.

[5] The State v. Leonard, 6 Coldw. 307.

[6] Calkins v. The State, 18 Ohio State, 366; Johnson v. Commonwealth, 5 Bush, 430.

[7] Commonwealth v. Tuckerman, 10 Gray, 173; The State v. Hunnicut, 34 Ark. 562.

a large sum of money, to wit, the sum of £10, and afterwards embezzled the same," not being sufficient.[1] In other words, the indictment must describe, according to the fact, some of the identical goods or money.[2] So the evidence must establish the embezzlement of the specific articles described.[3]

§ 375. **Continued — General Deficiency of Accounts.** — On this subject, however, the English statute of 7 & 8 Geo. 4, c. 29, § 48, contained the provision, not in the former enactments, "That it shall be lawful to charge in the indictment, and proceed against the offender for, any number of distinct acts of embezzlement, not exceeding three, which may have been committed by him against the same master, within the space of six calendar months from the first to the last of such acts; and, in every such indictment, except where the offence shall relate to any chattel, it shall be sufficient to allege the embezzlement to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved, or if he shall be proved to have embezzled any piece of coin or valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, and such part shall have been returned accordingly."[4] On common-law

[1] Rex *v.* Flower, 5 B. & C. 736, 8 D. & R. 512; Rex *v.* Furneaux, Russ. & Ry. 335.

[2] See, on this question, Crim. Proced. II. § 316–323.

[3] Rex *v.* Tyers, Russ. & Ry. 402.

[4] See 2 Russ. Crimes, 3d Eng. ed. 167. This, however, is now repealed in England; and, in place of it, is Stat. 24 & 25 Vict. c. 96, § 71, to the same effect in substance, but differing somewhat, as follows: "For preventing difficulties in the prosecution of offenders in any case of embezzlement, fraudulent application or disposition hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against Her Majesty or against the same master or employer, within the space of six months from the first to the last of such acts; and, in every such indictment where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition, to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled or fraudulently applied or

principles, a statute providing a simpler form of indictment does not change the nature of the offence, or diminish the quantity, or modify the species, of proof. And this enactment, notwithstanding doubts created by one case,[1] has not so operated practically in England, but even now it will not suffice merely to show at the trial a general deficiency in account; some specific sum must be proved to have been embezzled, the same as in larceny some particular article must be shown to have been stolen.[2] In some of our States there are statutes similar to this English one.[3]

§ 376. **Illustrations from the Evidence.** — The nature of the evidence informs us also of the nature of the offence. Thus, —

The Accounts. — Though there may be embezzlement of money without false accounts;[4] yet, if a servant keeps true accounts, or otherwise duly acknowledges the receipt of money, he cannot ordinarily be convicted of embezzling it, however he may appropriate it to his own use;[5] though, on the other hand, the mere fact of his making an entry in the books of account will not necessarily exempt him from the charge of embezzlement.[6]

Neglect to pay over. — At all events, the mere fact of not paying the money over is clearly insufficient,[7] even though he sets up an excuse never so frivolous, or a claim in himself wholly unfounded,[8] or though he absconds;[9] yet, under the circumstances of one case, absconding was ruled to be enough to warrant the jury in convicting the prisoner.[10] "I think," said Bolland, B., on another occasion, "it is essential that there should be a denial of having received the money, or else that some false account should

disposed of any amount, although the particular species of coin or valuable security of which such amount was composed, should not be proved; or if he shall be proved to have embezzled or fraudulently applied or disposed of any piece of coin or any valuable security or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly."

[1] Rex *v.* Grove, 1 Moody, 447, 7 Car. & P. 635.

[2] Reg. *v.* Jones, 8 Car. & P. 288. A conclusion, however, somewhat shaken by the later case of Reg. *v.* Moah, Dears. 626, 36 Eng. L. & Eq. 592.

[3] Commonwealth *v.* Wyman, 8 Met. 247.

[4] Ante, § 373.

[5] Rex *v.* Hodgson, 3 Car. & P. 422; Reg. *v.* Norman, Car. & M. 501; Reg. *v.* Creed, 1 Car. & K. 63. And see Rex *v.* Beacall, 1 Car. & P. 310.

[6] Reg. *v.* Lister, Dears. & B. 118, 37 Eng. L. & Eq. 600.

[7] Rex *v.* Smith, Russ. & Ry. 267. See The State *v.* Leonard, 6 Coldw. 307.

[8] Reg. *v.* Norman, Car. & M. 501.

[9] Reg. *v.* Creed, 1 Car. & K. 63.

[10] Rex *v.* Williams, 7 Car. & P. 338

be given."[1] Still, in a public officer, the mere neglect to pay over to the government the moneys received is pretty distinct evidence of embezzlement,[2] and stringent evidence if accompanied by a refusal.[3]

The Usual Evidence — False Accounts. — The proof commonly relied upon and held sufficient, is, either that the servant has wilfully made in his books false entries,[4] or else that he has denied or wilfully omitted to acknowledge the receipt of the embezzled article or fund.[5] But, as we have seen, this is not the only proof.

§ 377. **Further of False Entries.** — Where a clerk, receiving £18 in one-pound notes, immediately entered it as £12, intending to embezzle the £6, the majority of the judges held, that he was rightly convicted as of the latter amount; although the further fact appeared, that afterward, and during the same day, before the time came to pay over his receipts to his employer, he had taken a larger sum, of which he made a correct entry; and that he accounted for all his receipts of the day, except the six pounds, and so the particular six one-pound notes might, for any thing appearing to the contrary, have been delivered over.[6] Here the offence was complete when the false entry was made; and matter subsequent, at least such matter, could not undo what had been done.

§ 378. **Altering Entry.** — When, however, a clerk, having already in his hands funds of his employer, received £7 2*s*. 6*d*., of which he made a correct entry in his books of account, and put it with those funds, but afterward altered the entry to £5 6*s*. 10½*d*., for which latter sum only he accounted, the judges were

[1] Reg. *v.* Jones, 7 Car. & P. 834.

[2] The State *v.* Cameron, 3 Heisk. 78.

[3] The State *v.* Leonard, 6 Coldw. 307; Reg. *v.* Guelder, Bell C. C. 284, 8 Cox C. C. 372.

[4] Rex *v.* Hall, Russ. & Ry. 463. A mere omission to enter the sum is not in itself alone sufficient. Rex *v.* Jones, 7 Car. & P. 833. And see Rex *v.* Tyers, Russ. & Ry. 402; Reg. *v.* Chapman, 1 Car. & K. 119.

[5] Reg. *v.* Jackson, 1 Car. & K. 384; Rex *v.* Jones, 7 Car. & P. 833; Rex *v.* Taylor, 2 Leach, 4th ed. 974, Russ. & Ry. 63, 3 B. & P. 596; Rex *v.* Hobson, Russ. & Ry. 56, 2 Leach, 4th ed. 975; Reg. *v.* Murdock, 2 Den. C. C. 298, 8 Eng. L. & Eq. 577; Rex *v.* Borrett, 6 Car. & P. 124; Reg. *v.* Aston, 2 Car. & K. 413; Reg. *v.* White, 8 Car. & P. 742; Reg. *v.* Wortley, 2 Den. C. C. 333, 15 Jur. 1137; Reg. *v.* Welch, 1 Den. C. C. 199; Reg. *v.* Betts, Bell C. C. 90, 8 Cox C. C. 140. See also United States *v.* Forsythe, 6 McLean, 584; Batchelder *v.* Tenney, 27 Vt. 578.

[6] Rex *v.* Hall, Russ. & Ry. 463, 3 Stark. 67. And see Reg. *v.* Welch, 1 Den. C. C. 199; Rex *v.* Hoggins, Russ. & Ry. 145; ante, § 374.

of opinion, that he could not be convicted of embezzling the difference between these two sums; because he "might have paid over the whole of what he received for the £7 2*s*. 6*d*., and have taken the £1 15*s*. 7*d*. from the other moneys."[1] But, in principle, this case should be set down among the doubtful. If he embezzled the sum alleged, what matter from what fund he took it?

Precise Sum. — In a jury case, before Williams, J., an acquittal was ordered on facts not greatly differing from these; because the prosecutor could not show, what the judge said was necessary, a precise sum received by the prisoner on his master's account, and the whole or part of the very sum appropriated to his own use.[2]

VI. *The Intent.*

§ 379. **General View.** — This is not an offence which requires any special observations concerning the intent; therefore the reader need only be referred to the general doctrines on this subject, stated in the first volume.[3] If a man commits the act of embezzlement, the presumption is, that he means to embezzle.[4] Still there must be a criminal intent.[5]

VII. *Remaining and Connected Questions.*

§ 380. **Felony or Misdemeanor.** — This offence being statutory, he terms of the statute will determine whether it is felony or misdemeanor in a particular State. But, in England,[6] it is felony; and so it is generally in our States, though there may be States in which it is only misdemeanor.[7] Where it is, as in England, a statutory larceny, if larceny remains a felony as at common law, plainly embezzlement will be a statutory felony; or, if there is a general provision making all crimes punishable in a particular way felonies, embezzlement will be such if so punishable.

[1] Rex *v.* Tyers, Russ. & Ry. 402.
[2] Reg. *v.* Chapman, 1 Car. & K. 119.
[3] Vol. I. § 204–207, 285 et seq. And see United States *v.* Sander, 6 McLean, 598.
[4] People *v.* Hennessey, 15 Wend. 147
[5] United States *v.* Sander, supra.
[6] Archb. New Crim. Proced. 448.
[7] Vol. I. § 614 et seq.

§ 381. **Partial Legislation — Unconstitutional.** — In Tennessee, the act incorporating the Union Bank having made it felony if any of "the officers, agents, or servants" of this particular bank should embezzle its funds, or make false entries, the provision was held to be unconstitutional and void; because, as it embraced only the officers of one bank, not all persons in the like situations, it was partial in its operation. If it had extended to the officers of all banks, it would not have been so. The constitutional inhibition violated was said to be, that no person shall be imprisoned, &c., but by the judgment of his peers, or "the law of the land."[1]

§ 382. **State and United States — Constitutional.** — In connection with this subject, some questions arise which, in their general aspects, are considered elsewhere in these volumes.[2] If a State statute is in terms sufficiently broad, embezzlement, committed by an officer of a national bank, may, there is authority for holding, be punished under it in the State courts, provided the criminal fact does not fall also within a statute of the United States.[3] But, in the cases which have arisen, it has been assumed and decided, without much consideration, that, where the act of embezzlement falls equally within the inhibitions of the State law and a law of Congress, it can be punished only under the latter.[4] And it was even held in Massachusetts, that, if the principal is indictable under the national law, and the accessory is not, still the latter cannot be indicted under the State law.[5] It is not proposed to inquire here, how far the doctrines of this section are sound; that has been done, in part, in other connections, at the places cited at the opening of this section.

§ 383. **Conclusion.** — In passing from this subject let us still bear in mind, what has been already observed, that the statutes of our States are many and diverse; consequently we should not hastily accept as authority upon one statute what has been decided under another. We should also bear in mind, that, at

[1] Budd *v.* The State, 3 Humph. 483.

[2] Vol. I. § 178, 179, 987, 989; ante, § 284–287.

[3] The State *v.* Tuller, 34 Conn. 280; Commonwealth *v.* Tenney, 97 Mass. 50.

[4] The State *v.* Tuller, supra; Commonwealth *v.* Felton, 101 Mass. 204.

[5] Commonwealth *v.* Felton, supra. I have deemed it not best to inquire whether the Revised Statutes of the United States have wrought any change on this subject.

some points, adjudication has departed widely from principle. Now, a particular point of this sort may not have been settled in our own State; and, where such is the fact, it will be well to endeavor to bring the courts to principle, instead of suffering them unwarned to follow decisions from England or other States, which, while they are not binding, are wrong.

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CHAPTER XVII.

EMBRACERY.[1]

§ 384. **How defined — General Description.** — The crime of embracery is mentioned in the old books. It is a species of maintenance, consisting of an attempt corruptly to influence a jury.[2] Blackstone defines it as "an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like."[3] And Hawkins says: "It seems clear, that any attempt whatsoever to corrupt or influence or instruct a jury, or any way to incline them to be more favorable to the one side than to the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence and the arguments of the counsel in open court, at the trial of the cause, is a proper act of embracery; whether the jurors on whom such attempt is made give any verdict or not, or whether the verdict given be true or false."[4]

[1] For the pleading, practice, and evidence, relating to this offence, see Crim. Proced. II. § 344–347. And see Stat. Crimes, § 568.

[2] 4 Bl. Com. 140; 1 Hawk. P. C. Curw. ed. p. 466, § 1; Vol. I. § 468.

[3] 4 Bl. Com. 140.

[4] 1. 1 Hawk. P. C. Curw. ed. p. 466, § 1. **Old English Statutes.** — There are, upon this subject, old English statutes, some of which may doubtless be deemed to be common law in this country. See Roberts's Eng. Stats. in force in Pa. 332 et seq. Of the more important of these are the following: —

2. **5 Edw. 3, c. 10,** entitled "The Punishment of a Juror that is Ambidexter and taketh Money." Its important words are: "If any juror, in assizes, juries, or inquests, take of the one party or of the other, and be thereof duly attainted, that hereafter he shall not be put in any assizes, juries, or inquests, and nevertheless he shall be commanded to prison, and further ransomed at the king's will."

3. **34 Edw. 3, c. 8,** entitled, "The Penalty of a Juror taking Reward to give his Verdict." It provides, "that, in every plea, whereof the inquest or assize doth pass, if any of the parties will sue against any of the jurors, that they have taken of his adversary, or of him, for to give their verdict, he shall be heard, and shall have his plaint by bill presently before the justices before whom they did swear, and that the juror be put to answer without any delay; and, if they plead to the country, the inquest shall be taken presently. And if any man other than the party will sue for the king against the juror, it shall be heard and determined as afore is said. And if the juror be attainted at the suit of other than the party, and maketh fine, the party that sueth shall have half the

§ 385. **Exhorting Juror to do Justice.** — Hawkins attenuates the doctrine thus: "The law so abhors all corruptions of this kind, that it prohibits every thing which has the least tendency to it,

fine; and that the parties to the plea shall recover their damages by the assessment of the inquest; and that the juror so attainted have imprisonment for one year, which imprisonment the king granteth that it shall not be pardoned for any fine. And if the party will sue by writ before other justices, he shall have the suit in form aforesaid."

4. **38 Edw. 3, stat. 1, c. 12,** entitled, "The Punishment of a Juror taking Reward to give Verdict, and of Embraceors." It is: "As to the article of jurors in the four and thirtieth year, it is assented and joined to the same, that, if any juror in assizes sworn, and other inquests to be taken between the king and party, or party and party, do any thing take by them or other of the party plaintiff or defendant, to give their verdict, and thereof be attainted by process contained in the same article [that is, process mentioned in the foregoing Stat. 34 Edw. 3, c. 8], be it at the suit of the party that will sue for himself, or for the king, or any other person, every of the said jurors shall pay ten times as much as he hath taken; and he that will sue shall have the one half, and the king the other half. And that all the embraceors that bring or procure such inquests in the country to take gain or profit, shall be punished in the same manner and form as the jurors; and, if the juror or embraceor so attainted have not whereof to make gree in the manner aforesaid, he shall have the imprisonment of one year. And the intent of the king, of the great men, and of the commons, is, that no justice nor other minister shall inquire of office upon any of the points of this article, but only at the suit of the party, or of other, as afore is said."

5. Lastly, we have **32 Hen. 8, c. 9,** entitled, "The Bill of Bracery and Buying of Titles." It is of but little consequence in this connection; the more material part of it relates to the buying and selling of pretended titles; and, as to this part, it is not received in all the States. See ante, § 172, 173. It is not, for example, in Georgia. Cain *v.* Monroe, 23 Ga. 82; Harring *v.* Barwick, 24 Ga. 59; Webb *v.* Camp. 26 Ga. 354. But this Georgia opinion, dissented from by one judge, does not necessarily exclude the operation of the statute in cases of embracery. In the preamble it is said, "that there is nothing within this realm that conserveth his [the king's] loving subjects in more quietness, rest, peace, and good concord, than the due and just ministration of his laws, and the true and indifferent trials of such titles and issues as been to be tried according to the laws of this realm; which his most royal majesty perceiveth to be greatly hindered and letted by maintenance, embracery, champerty, subornation of witnesses, sinister labor, buying of titles and pretensed rights of persons not being in possession; whereupon great perjury hath ensued, and much inquietness, oppression, vexation, troubles, wrongs, and disinheritance." It is therefore enacted, § 1, "that from henceforth all statutes heretofore made concerning maintenance, champerty, and embracery, or any of them, now standing and being in their full strength and force, shall be put in due execution according to the tenures and effects of the same statutes." § 3. That, among other things, "no person, &c., do hereafter unlawfully retain, for maintenance of any suit or plea, any person or persons, or embrace any freeholders or jurors," &c.

6. **Interpretations of these Statutes** — It is perceived, that, in part at least, these statutes were passed to authorize a civil action against the person guilty of embracery. But Hawkins observes, in answer to the inquiry "how far offences of this kind are restrained by the common law," that "there can be no doubt but that they subject the offender either to an indictment or action, in the same manner as all other kinds of unlawful maintenance do by the common law." 1 Hawk. P. C. Curw. ed. p. 467, § 7.

what specious pretence soever it may be covered with; and therefore it will not suffer a mere stranger so much as to labor a juror to appear and act according to his conscience." [1] But this latter clause is carrying an old refinement quite far; for an honest exhortation to do justice should never be construed into guilt.

§ 386. **Giving Money to Juror.** — "Also it is said," continues Hawkins, "that generally the giving of money to a juror after the verdict, without any precedent contract in relation to it, is an offence savoring of the nature of embracery; because, if such practices were allowable, it would be easy to evade the law by giving jurors secret intimations of such an intended reward for their service, which might be of as bad consequence as the giving of money beforehand. But it seems clear that the giving of jurors such a reasonable recompense as is usually allowed them for their expenses in travelling, &c., and which may fairly be expected by them from either side that shall prevail, is no way criminal; because, if no such allowance were to be expected, it would be often difficult to prevail with persons to serve on a jury at their own charge. And therefore by experience it hath been found necessary to permit the parties to give jurors some amends for their charges." [2] In our States, the matter of compensation to jurors is generally, perhaps universally, regulated by statutes; consequently there is no room for suffering any other compensation to be given by the parties.

§ 387. **Continued — Efforts to secure Verdict.** — "It hath been adjudged," continues Hawkins, "that the bare giving of money

Moreover, a nice attention to the words of the statutes shows, that they were not meant to take away the right of indictment for the acts for which they provide an additional restraint.

7. **Old Idea of the Offence.** — In the law dictionary, latterly known under the name of Tomlins, formerly of Jacob, we have the following: "*Embraceor.* He that, when a matter is in trial between party and party, comes to the bar with one of the parties, having received some reward so to do, and speaks in the case; or privately labors the jury, or stands in the court to survey or overlook them, whereby they are awed or influenced, or put in fear or doubt of the matter. But lawyers, attorneys, &c., may speak in the case for their clients, and not be embraceors. Also the plaintiff may labor the jurors to appear in his own cause, but a stranger must not do it; for the bare writing a letter to a person, or personal request for a juror to appear, not by the party himself, hath been held within the statutes against embracery and maintenance. Co. Lit. 369; Hob. 294; 1 Saund. 391. If the party himself instructs a juror, or promises any reward for his appearance, then the party is likewise an embraceor. And a juror may be guilty of embracery, when he, by indirect practices, gets himself sworn on the *tales*, to serve on one side. 1 Lil. 513."

[1] 1 Hawk. P. C. Curw. ed. p. 466, § 2.

[2] 1 Hawk. P. C. Curw. ed. p. 466, § 3

to another to be distributed among jurors is an offence of the nature of embracery, whether any of it be actually so distributed or not. Also it is clear, that it is as criminal in a juror as in any other person to endeavor to prevail with his companions to give a verdict for one side by any practices whatsoever, except only by arguments from the evidence which was produced, and exhortations from the general obligations of conscience to give a true verdict. And there can be no doubt but that all fraudulent contrivances whatsoever to secure a verdict are high offences of this nature; as, where persons by indirect means procure themselves or others to be sworn on a tales in order to serve one side." [1]

§ 388. **Why an Offence.** — Whatever may be said of maintenance proper, with which this offence of embracery is in the books found connected, and of which it constitutes in some sense a part, there can be no doubt that embracery is to be reckoned among our common-law crimes, not merely because it was punishable in England when this country was settled, but also because the form of evil-doing, which its penalties were ordained to suppress, is contrary to good morals at all times, and subversive always of justice in the courts, and a grievous wrong of a nature always held to be indictable. The law on this subject should, with us, be more "put in ure," to use an old expression, than it is.

§ 389. **Attempts.** — Embracery being an attempt, as well as a consummated act, there appears to be no room for such an offence as an attempt to commit embracery; because, if there is an attempt which is indictable, it is itself embracery.[2]

[1] 1 Hawk. P. C. Curw. ed. p. 467, § 4. [2] Ante, § 384, 387; Crim. Proced. II § 347; The State *v.* Sales, 2 Nev. 268.

For ENGROSSING, see Vol. I. § 518 et seq.
ENTRY, FORCIBLE, see FORCIBLE ENTRY AND DETAINER.
ESCAPE, see PRISON BREACH, &c.
ESTRAY ANIMALS, see Stat. Crimes.
EXPOSURE OF PERSON, see Vol. I § 1125 et seq.

CHAPTER XVIII.

EXTORTION.[1]

§ 390, 391. Introduction.
392. May be committed only by an Officer.
393. Must be by Color of his Office.
394, 395. The Act must be within a Legal Prohibition.
396–400. Must be corruptly done.
401, 402. The Thing obtained by Extortion.
403, 404. English and American Statutes.
405–408. Remaining and Connected Questions.

§ 390. **Why Indictable.** — In the preceding volume we saw, that all persons who assume official position place themselves thereby in circumstances to exert a peculiar power, which brings with it corresponding obligations cognizable by the criminal law; consequently they are liable to indictment for any malfeasance in office.[2] Among wrongful official acts, open to special reprehension, is extortion.

How defined. — It is the corrupt demanding or receiving, by a person in office, of a fee for services which should be performed gratuitously; or, where compensation is permissible, of a larger fee than the law justifies, or a fee not due.[3]

[1] For matter relating to this title, see Vol. I. § 573, 587, 715. For the pleading, practice, and evidence, see Crim. Proced. II. § 357 et seq. And see, as to both law and procedure, Stat. Crimes, § 171, note, 217, 346, note, 570.

[2] Vol. I. § 218, 219, 239, 316, 321, 459, 468, 469, 573.

[3] Blackstone defines: "Extortion is an abuse of public justice, which consists in any officer's unlawfully taking, by color of his office, from any man, any money or thing of value, that is not due to him, or before it is due." And he adds: "The punishment is by fine and imprisonment, and sometimes by a forfeiture of the office." 4 Bl. Com. 141. Hawkins: "It is said, that extortion in a large sense signifies any oppression under color of right; but that in a strict sense it signifies the taking of money by any officer, by color of his office, either where none at all is due, or not so much is due, or where it is not yet due." 1 Hawk. P. C. Curw. ed. p. 418, § 1. The New York commissioners propose the following: "Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right." Draft of Penal Code, A. D. 1864, p. 220. It will be perceived that this proposed definition extends the boundaries of the offence over a wider field of indictable wrong than it occupies, under the same name, in the common law.

Corrupt. — Implying an evil mind, it is not committed when the fee comes voluntarily, in return for real benefits conferred by extra exertions put forth.[1]

§ 391. We shall consider, I. The Offending Person must be an Officer; II. The Thing extorted must be obtained by Color of his Office; III. The Act must be within the Prohibitions of Law; IV. The Act must proceed from a Corrupt Motive; V. What must be the Thing obtained; VI. Statutes, English and American, relating to this Subject; VII. Remaining and Connected Questions.

I. *The Offending Person must be an Officer.*

§ 392. **General Doctrine.** — The law has not confined this offence to any class of officers; but, wherever it has cast official duties, and conferred official privileges, it has subjected the individual to liability for acts of extortion. Thus, —

Particular Officers. — All justices of the peace,[2] sheriffs and their deputies,[3] constables,[4] jailers,[5] lawyers admitted to practice,[6] collectors of taxes,[7] persons in England who preside over the ecclesiastical courts,[8] clerks of courts,[9] and indeed every other description of person upon whom the mantle of office has fallen,[10] may commit this offence.

[1] See Vol. I. § 573. And see The State *v.* Stotts, 5 Blackf. 460; Rex *v.* Baines, 6 Mod. 192; Williams *v.* The State, 2 Sneed, 160; Evans *v.* Trenton, 4 Zab. 764.

[2] Rex *v.* Seymour, 7 Mod. 382; The State *v.* Maires, 4 Vroom, 142; Cutter *v.* The State, 7 Vroom, 125; Reg. *v.* Tisdale, 20 U. C. Q. B. 272.

[3] Commonwealth *v.* Bagley, 7 Pick. 279; Hescott's Case, 1 Salk. 330.

[4] The State *v.* Merritt, 5 Sneed, 67.

[5] Commonwealth *v.* Mitchell, 3 Bush, 25.

[6] Adams *v.* Tertenants of Savage, Holt, 179; Troy's Case, 1 Mod. 5. But in New Hampshire, the statutory penalty for taking illegal fees is incurred only where a public officer, or some one in his behalf, and with his assent, demands and receives compensation for a service rendered in the discharge of his official duties, other or greater than the law allows. And attorneys, while receiving pay in their offices for services rendered to their clients, in what is preliminary to proceedings before a judicial tribunal, cannot be regarded as public officers acting officially. The provision of the statute that only one dollar shall be allowed for a writ, including the blank, in bills of cost taxed in the Supreme Court or Court of Common Pleas, is not violated by an attorney's receiving a larger sum as his compensation for making a writ, while adjusting a suit for his client, before it has been entered in court. Wilcox *v.* Bowers, 36 N. H. 372.

[7] Reg. *v.* Buck, 6 Mod. 306.

[8] Smythe's Case, Palmer, 318.

[9] Rex *v.* Baines, 6 Mod. 192. And see Commonwealth *v.* Rodes, 6 B. Monr. 171.

[10] Smith *v.* Mall, 2 Rol. 263; Rex *v.*

Officer de Facto. — There is no necessity for the officer to be one *de jure*, if only he holds the office *de facto* it is sufficient.[1] Indeed a person who serves as an officer, and claims to be such, is estopped to deny his official appointment.[2]

One falsely Pretending. — Even an offence analogous to extortion may be perpetrated by an unofficial person who falsely pretends to be an officer.[3]

Analogous Offences — Railroad Fare. — And there are still other analogous offences, both at the common law and under statutes, sometimes in a sort of loose way called extortion, to commit which it is not necessary the offender should be an officer. Thus, in New York, a railroad company which exacts the legal rate of fare in gold coin, or its value in paper currency, is said to be guilty of extortion. It is liable to the penalty of fifty dollars for asking and receiving a greater fare than is allowed by law.[4]

II. *The Thing extorted must be obtained by Color of Office.*

§ 393. **General Doctrine.** — The thing taken must be procured by the officer under color of his office.[5] Thus, —

Arrest on Forged Warrant. — If such person arrests a man on a warrant which he knows to be forged, and thereby extorts money from him, he takes it under color of his office, and so commits this offence.[6]

III. *The Act must be within the Prohibitions of Law.*

§ 394. **English Examples.** — Russell says:[7] "It has been held to be extortion to oblige the executor of a will to prove it in the bishop's court, and to take fees thereon, when the defendants knew that it had been proved before in the prerogative court.[8]

Burdett, 1 Ld. Raym. 148; The State *v.* Burton, 3 Ind. 93; Commonwealth *v.* Hagan, 9 Philad. 574.

[1] 1 Gab. Crim. Law, 783. And see The State *v.* McEntyre, 3 Ire. 171, 174; post, § 407.

[2] The State *v.* Sellers, 7 Rich. 368, 372. And see People *v.* Cook, 4 Seld. 67; Rex *v.* Borrett, 6 Car. & P. 124.

[3] Serlested's Case, Latch. 202; Vol. I. § 468 and note, 587.

[4] Lewis *v.* New York Central Railroad, 49 Barb. 330. And see ante, § 390, note.

[5] Rex *v.* Baines, 6 Mod. 192. And see People *v.* Whaley, 6 Cow. 661; Shattuck *v.* Woods, 1 Pick. 171; Gallagher *v.* Neal, 3 Pa. 183; Runnells *v.* Fletcher, 15 Mass. 525; Evans *v.* Trenton, 4 Zab. 764. See Reg. *v.* Best, 2 Moody, 124.

[6] Reg. *v.* Tracy, 6 Mod. 30.

[7] 1 Russ. Crimes, 3d Eng. ed. 143.

[8] Rex *v.* Loggen, 1 Stra. 73.

And it is extortion in a church-warden to obtain a silver cup or other valuable thing, by color of his office.[1] And a coroner is guilty of this offence who refuses to take the view of a dead body until his fees are paid.[2] So if an under-sheriff obtain his fees by refusing to execute process till they are paid,[3] or take a bond for his fee before execution is sued out,[4] it will be extortion. And it will be the same offence in a sheriff's officer to bargain for money to be paid him by A, to accept A and B as bail for C, whom he has arrested;[5] or to arrest a man in order to obtain a release from him;[6] and also in a jailer to obtain money from his prisoner by color of his office.[7] In the case of a miller, where the custom has ascertained the toll, if the miller takes more than the custom warrants, it is extortion;[8] and the same, if a ferryman takes more than is due by custom for the use of his ferry.[9] And it was held, that, if the farmer of a market erects so many stalls as not to leave sufficient room for the market-people to stand and sell their wares, so that, for want of room, they are forced to hire the stalls of the farmer, the taking money for the use of the stalls in such a case is extortion.[10] Where a collector of post-horse duty demanded a sum of money of a person, charging him with having let out post-horses without paying the duty, and threatened him with an exchequer process, and he thereon gave him a promissory note for five pounds, which was afterwards paid, and the proceeds handed over to the farmer of the post-horse duties, it was held to be an extortion." [11]

§ 395. **American.** — Some of the cases thus cited by Russell show a form of extortion which could not be practised in this country; yet all are instructive, as illustrating the principle on which this offence rests. For example, —

Fees in Advance. — The rule, settled in England,[12] that extortion may be committed by an officer demanding his fees in advance, has been expressly adopted in this country.[13]

[1] Rex *v.* Eyres, 1 Sid. 307.
[2] 3 Inst. 149; Rex *v.* Harrison, 1 East P. C. 382.
[3] Hescott's Case, 1 Salk. 330.
[4] Empson *v.* Bathurst, Hut. 52.
[5] Stotesbury *v.* Smith, 2 Bur. 924.
[6] Williams *v.* Lyons, 8 Mod. 189.
[7] Rex *v.* Broughton, Trem. P. C. 111; Reg. *v.* Tracy, 6 Mod. 178.
[8] Rex *v.* Burdett, 1 Ld. Raym. 148.
[9] Rex *v.* Roberts, 4 Mod. 101.
[10] Rex *v.* Burdett, 1 Ld. Raym. 148.
[11] Rex *v.* Higgins, 4 Car. & P. 247.
[12] Ante, § 394; Rex *v.* Baines, 6 Mod. 192, W. Jones, 65; Hescott's Case, 1 Salk. 330.
[13] Commonwealth *v.* Bagley, 7 Pick. 279; The State *v.* Maires, 4 Vroom, 142;

Where none Demandable. — And if, under the circumstances, no fee is demandable, it is extortion corruptly to demand and receive one.[1] In a New York case, where a cause before a justice of the peace was discontinued by laches of the plaintiff, but the justice adjourned it and gave judgment for the plaintiff afterward, receiving from the defendant the amount of the debt, together with 12½ cents for his fees, under the pretence of there being a valid judgment rendered, — the court decided that the taking of the 12½ cents by the justice for fees was extortion in him, if the jury should believe him to have acted from a corrupt motive.[2]

Not within Official Duty. — If an officer performs services not within the duties of his office, he may lawfully receive pay for them.[3]

IV. *The Act must proceed from a Corrupt Motive.*

§ 396. **General Doctrine.** — No act, carefully performed, from motives which the law recognizes as honest and upright, is punishable as a crime.[4] And it has always been held, that extortion proceeds only from a corrupt mind.[5]

§ 397. **Perquisites.** — Hawkins, speaking of Stat. Westm. 1, c. 26,[6] which is merely confirmatory of the prior common law, says: "It hath been holden, that the fee of twenty pence, commonly called the bar fee, which hath been taken time out of mind by the sheriff, of every prisoner who is acquitted, and also the fee of one penny, which was claimed by the coroner of every visne when he came before the justices in eyre, are not within the meaning of the statute; because they are not demanded by the sheriff or coroner for doing any thing relating to their offices,

The State *v.* Vasel, 47 Misso. 444; The State *v.* Vasel, 47 Misso. 416.

[1] Commonwealth *v.* Mitchell, 3 Bush, 25; Cross *v.* The State, 1 Yerg. 261.

[2] People *v.* Whaley, 6 Cow. 661.

[3] Dutton *v.* The City, 9 Philad. 597; ante, § 390.

[4] Vol. I. § 285 et seq.

[5] People *v.* Whaley, 6 Cow. 661; Jacobs *v.* Commonwealth, 2 Leigh, 709; The State *v.* Stotts, 5 Blackf. 460; Respublica *v.* Hannum, 1 Yeates, 71, The State *v.* Bright, 2 Car. Law Repos. 634.

[6] This statute, otherwise cited as 3 Edw. 1, c. 26, is, — "And that no sheriff, nor other the king's officer take any reward to do his office, but shall be paid of that which they take of the king; and he that so doth shall yield twice as much, and shall be punished at the king's pleasure."

but claimed as perquisites of right belonging to them, whether they do any thing or not. But there seemeth to be no necessity for this distinction; for it cannot be intended to be the meaning of the statute to restrain the courts of justice, in whose integrity the law always reposes the highest confidence, from allowing reasonable fees for the labor and attendance of their officers. For the chief danger of oppression is from officers being left at their liberty to set their own rates on their labor, and make their own demands; but there cannot be so much fear of these abuses, while they are restrained to known and stated fees, settled by the discretion of the courts, which will not suffer them to be exceeded without the highest resentment." [1]

§ 398. **Fees added to Salary.** — So much from Hawkins is doubtless sound in law at the present day. But we may question the following, in its application to our time and country: "Also it having been found by experience, that generally it is in vain to expect that any officers who depend upon a known fixed salary, without having any immediate benefit from any particular instances of their duty, should be so ready in undertaking, or diligent in executing them, as they would be if they were to have a present advantage from them, it hath been thought expedient to permit them to take certain fees in many cases." The rest of what follows is correct: "But it is certain that they are guilty of extortion if they take any thing more." [2] The light of the present time should be deemed sufficient to enable men employed on salaries to perform their duties when paid once, without the stimulant of a second payment for each instance of discharging the obligation they assumed in accepting office.[3]

§ 399. **Usage as justifying Excess of Fees, &c.** — We have some American cases to the question whether, if, following a general usage, an officer takes a larger fee than the law has prescribed, or demands and receives the prescribed fee before it is due, he can rely on this usage in his defence when charged with extor-

[1] 1 Hawk. P. C. Curw. ed. p. 418, 419, § 3.

[2] 1 Hawk. P. C. Curw. ed. p. 419, § 4.

[3] **No Fee allowed.** — In Pennsylvania, if a justice of the peace demands and receives a fee for a service for which none is allowed by law, he incurs the penalty prescribed for taking illegal fees. **Overcharge.** — So if he charges more than 18¾ cents for a copy of his proceedings, including the judgment, this being the statutory fee. Simmons *v.* Kelly, 9 Casey, 190. See also Debolt *v.* Cincinnati, 7 Ohio State, 237.

tion. There is a Pennsylvania case wherein the opinion seems to be that he can.[1] On the other hand, the Massachusetts court has directly adjudged that he cannot.[2] The motive, in this instance, is not what a non-professional man would call corrupt, but it is so legally. For, as we saw in the preceding volume,[3] every person is conclusively presumed to know the law, and to know, what is well settled, that there can be no custom or usage made legal in opposition to a statute; consequently, if the fee is prescribed by law, no individual officer can excuse himself by showing that other officers have violated the law, or that he himself has, as often as he has had the opportunity. Even Hawkins, who, we have seen,[4] is inclined to hold the rein loosely over these functionaries, takes substantially this ground.[5]

§ 399 *a*. **Fee taken under Mistake of Law.** — At the same time, the question of the effect of a mistake in law is, in a case of this sort, a very nice one, and one upon which it is not easy to lay down any rule with a perfect assurance that it will be accepted in all tribunals. "If," said Beasley, C. J., in a late New Jersey case, "a justice of the peace, being called upon to construe a statute with respect to the fees coming to himself, should, exercising due care, form an honest judgment as to his dues, and should act upon such judgment, it would seem palpably unjust, and therefore inconsistent with the ordinary grounds of judicial action, to hold such conduct criminal, if it should happen that a higher tribunal should dissent from the view thus taken, and should decide that the statute was not susceptible of the interpretation put upon it." Therefore, on an indictment against a magistrate for taking illegal fees, he may, the court deemed, show

[1] Respublica *v.* Hannum, 1 Yeates, 71.

[2] Lincoln *v.* Shaw, 17 Mass. 410; Shattuck *v.* Woods, 1 Pick. 171; Commonwealth *v.* Bagley, 7 Pick. 279. But see Commonwealth *v.* Shed, 1 Mass. 227. The first two of these cases are the only ones which exactly cover the point of the text; and in them the proceeding was civil in form, for the recovery of the penalty, but the rule in such circumstances is the same as though the proceeding were by indictment. In New York it was held, that, if a justice of the peace refuses an adjournment because the party will not pay his fees for drawing a bond, on demanding the adjournment, he is indictable for misdemeanor. And Marcy, J., observed: "The magistrate misapprehended his duty in refusing the adjournment unless his fees for drawing the bond were paid. The payment of the fees was not a condition precedent to the adjournment of the cause; and the magistrate erred in withholding from the party his right on account of the non-payment of them." People *v.* Calhoun, 3 Wend. 420, 421.

[3] Vol. I. § 292 et seq.

[4] Ante, § 398.

[5] 1 Hawk. P. C. Curw. ed. p. 418, § 2. See Rex *v.* Seymour, 7 Mod. 382.

that they were honestly demanded and received under a mistake of his legal rights.[1] There are some analogies in the criminal law favoring this view. And in a case where there is a right to a fee, and the question is how much, and the law has provided no reference of it to any person other than the officer taking the fee, probably it is not obnoxious to established principle to hold, that, for the particular case, and as respects criminal liability, the honest and pains-taking decision of the officer should be accepted as the judgment of the law on the point.[2]

§ 400. **Fee taken under Mistake of Fact.** — If the mistake is one of fact,[3] and it proceeds from no carelessness or other fault, beyond all controversy it will excuse, in the criminal law, the act which otherwise would be extortion. Thus, where, in England, a clerk to justices of the peace demands and receives a fee for the taking of recognizances as for a principal and two sureties, there being really but one, he commits no offence and incurs no forfeiture, under Stat. 26 Geo. 2, c. 14, § 2, if he believes that there are two sureties. Said Lord Campbell, C. J.: "On the point whether an offence has been committed by the defendant acting in ignorance of the fact, I am clearly of opinion that the complaint fails. *Actus non facit reum nisi mens sit rea.*"[4]

V. *What must be the Thing obtained.*

§ 401. **Of Value — Mere Agreement.** — In the facts of most cases, what is obtained is money. A mere agreement to pay has been held insufficient.[5] The agreement is not a thing of value; but probably any thing of value will do. It need not be money.[6]

§ 402. **Under Statutes.** — Yet sometimes a statute specifies the thing which is forbidden to be taken; then the indictment, to be good under the statute, must specify the particular thing, and it must be proved.[7]

[1] Cutter *v.* The State, 7 Vroom, 125, 128. See post, § 404.

[2] Stat. Crimes, § 805, 806. And see the whole discussion there on "Election Frauds and Obstructions."

[3] Vol. I. § 292 et seq.

[4] Bowman *v.* Blyth, 7 Ellis & B. 26, 43.

[5] Commonwealth *v.* Cony, 2 Mass. 523; Commonwealth *v.* Pease, 16 Mass. 91; Rex *v.* Burdett, 1 Ld. Raym. 148. But see ante, § 394.

[6] Rex *v.* Burdett, 1 Ld. Raym. 148. See Reg. *v.* Johnson, 11 Mod. 62; The State *v.* Stotts, 3 Blackf. 460.

[7] Garner *v.* The State, 5 Yerg. 160.

VI. *Statutes, English and American, relating to this Subject.*

§ 403. **English.** — The offence of extortion is deemed so heinous, that from earliest times it has been made the subject of legislation; though it is equally indictable under the earlier English common law.[1] The English statutes are multitudinous; yet, of all which were passed before the settlement of this country, no one seems to be here of any practical consequence.[2]

§ 404. **American.** — In the United States there are many statutes, not abrogating the common law,[3] but furnishing additional remedies against officers committing this offence. But they have not called forth many expositions of general principles, rendering advisable other mention of them than a reference in the notes.[4] In Ohio, the office of township treasurer being abolished in Cincinnati, and its duties transferred to the county treasurer of Hamilton County, it was held, that he could not charge the fees of a township treasurer; because no officer whose compensation is regulated by fees can charge for a particular service, unless the law specifically gives him fees therefor. "Fees," said J. R. Swan, J., "are not allowed upon an implication; but, if they were, the implication in this case is, that the legislature, if they intended to give the fee of a township treasurer to a county treasurer, would have said so."[5]

The Intent. — The words of the New Jersey statute are general, — "shall receive or take, by color of his office, any fee or reward

[1] See 1 Hawk. P. C. Curw. ed. p. 418.

[2] The principal statute mentioned by Hawkins is that quoted ante, § 397 and note, cf Westm. 1 (3 Edw. 1), c. 26. It is but declaratory of the common law; and neither Kilty, nor the Pennsylvania judges in their Report, 3 Binn. 595, mention it among acts applicable. For a decision on Stat. 7 & 8 Vict. c. 84, § 79, see Reg. *v.* Badger, 6 Ellis & B. 137, 34 Eng. L. & Eq. 326.

[3] The Pennsylvania and Illinois statutes supersede the common law, at least to some extent. Commonwealth *v.* Evans, 13 S. & R. 426; Pankey *v.* People, 1 Scam. 80. But not the Massachusetts. Commonwealth *v.* Bagley, 7 Pick. 279; Shattuck *v.* Woods, 1 Pick. 171.

[4] Gallagher *v.* Neal, 3 Pa. 183; Reed *v.* Cist, 7 S. & R. 183; Commonwealth *v.* Evans, 13 S. & R. 426; Commonwealth *v.* Bagley, 7 Pick. 279; Shattuck *v.* Woods, 1 Pick. 171; Lincoln *v.* Shaw, 17 Mass. 410; Dunlap *v.* Curtis, 10 Mass. 210; Runnells *v.* Fletcher, 15 Mass. 525; Commonwealth *v.* Shed, 1 Mass. 227; Commonwealth *v.* Murphy, 12 Allen, 449; The State *v.* Brown, 12 Minn. 490; The State *v.* Lawrence, 45 Misso. 492; The State *v.* Maires, 4 Vroom, 142; The State *v.* Bruce, 24 Maine, 71; Stat. Crimes, § 250, note.

[5] Debolt *v.* Cincinnati, 7 Ohio State, 237, 239.

whatsoever not allowed by the laws of this State for doing his office," — and these were held not to preclude inquiry into the intent, the same as at the common law.[1]

VII. *Remaining and Connected Questions.*

§ 405. **Misdemeanor — Punishment.** — Extortion is misdemeanor at the common law, punishable, therefore, by fine and imprisonment;[2] "also," adds Hawkins, "by a removal from the office in the execution whereof it was committed."[3]

§ 406. **Accessories — Persons not Officers.** — Whether one, not an officer, who abets an officer in this offence, is punishable as for extortion, the authorities are not apparently distinct; but it has been held, that several persons may be made defendants jointly in one indictment, and therefore the inference seems to be, that the law does not require each defendant to be an officer, if only one is such.[4] Yet two officers — for example, two justices of the peace — may by acting in concert commit the joint offence.[5]

§ 407. **Persons not Officers, continued — Threat.** — In an English case it was held criminal at common law, to extort money from one by a threat to indict him for perjury; Holt, C. J., observing, "If a man will make use of a process of law to terrify another out of his money, it is such a trespass as an indictment will [therefor] lie."[6]

§ 408. **Extortion from Corporation.** — There may be an extortion from a county[7] or other corporation, the same as from an individual.

[1] Cutter *v.* The State, 7 Vroom, 125; ante, § 399 *a*.
[2] Ante, § 55 and note.
[3] 1 Hawk. P. C. Curw. ed. p. 419, § 5.
[4] See 1 Russ. Crimes, 3d Eng. ed. 144.
[5] Reg. *v.* Tisdale, 20 U. C. Q. B. 272.
[6] Reg. *v.* Woodward, 11 Mod. 137. See The State *v.* Bruce, 24 Maine, 71; ante, § 392.
[7] The State *v.* Moore, Smith, Ind. 316, 1 Ind. 548.

For FALSE IMPRISONMENT, see KIDNAPPING AND FALSE IMPRISONMENT.
FALSE NEWS, see Vol. I. § 472 et seq., 540.
FALSE PERSONATING, see ante, § 152–155; post, § 439, 440; Vol. I. § 468.

CHAPTER XIX.

FALSE PRETENCES.[1]

§ 409. Introduction.
410–414. General Doctrine and Statutes.
415–459. What is a False Pretence.
460–475. What must concur with the False Pretence.
476–484. What Property must be obtained.
485–488. Remaining and Connected Questions.

§ 409. **Order of this Chapter.** — We shall consider, I. The General Doctrine and the Statutes; II. What is a False Pretence III. What must concur with the False Pretence to constitute the Statutory Cheat; IV. What must be the Property obtained; V. Remaining and Connected Questions.

I. *The General Doctrine and the Statutes.*

§ 410. **Scope of this Discussion.** — We have already, under the separate title of "Cheats at the Common Law," considered the general doctrine of defrauding individuals and the public by false tokens, both under the ancient unwritten law and the declaratory statute of 33 Hen. 8, c. 1.[2] It remains for us, in this chapter, to take a view of the later statutes and their interpretations.

Views of the Statutes. — For, in the progress of trade and refinement, it became apparent that neither this statute nor the common law went far enough in the protection of fair dealing against knavery, and other provisions were added.[3] These consist in enactments against what is called the obtaining of property, or cheating, by false pretences. The American statutes are in substance copied from the English,[4] and the later Eng-

[1] For matter relating to this title, see Vol. I. § 110, 257, 369, 438, 585, 586, 686, 815. See this volume, CHEATS. For the pleading, practice, and evidence, see Crim. Proced. II. § 157 et seq. See, also, Stat. Crimes, § 133, 134, 260, 450–452.

[2] Ante, § 141 et seq.

[3] Vol. I. § 585, 586.

[4] See People *v.* Clough, 17 Wend. 351; People *v.* Johnson, 12 Johns. 292; People *v.* Stone, 9 Wend. 182; The State *v.* Rowley, 12 Conn. 101; Commonwealth *v.* Warren, 6 Mass. 72; Commonwealth *v*

lish from the earlier which are now repealed. Therefore, to the proper understanding of our subject, and the decisions upon it, the English statutes, whether repealed or in force, are important. The principal ones are the following: —

§ 411. **30 Geo. 2 — 52 Geo. 3.** — Stat. 30 Geo. 2, c. 24, § 1, repealed, provides, "that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, money, goods, wares, or merchandise, with intent to cheat or defraud any person or persons of the same . . . shall be deemed offenders against law and the public peace," and punished by fine, imprisonment, &c.[1] But this statute having been found defective in not providing against obtaining *choses in action* by false pretences, there was added Stat. 52 Geo. 3, c. 64, § 1, now also repealed, which enacts, "that all persons who knowingly and designedly, by false pretence or pretences, shall obtain from any person or persons, or from any body politic or corporate, any money, goods, wares, or merchandise, or any bond, bill of exchange, bank-note, promissory note, or other security for the payment of money, or any warrant or order for the payment of money or delivery or transfer of goods, or other valuable thing, with intent to cheat or defraud any person, &c., shall be deemed offenders against law and the public peace, and shall be liable to be prosecuted and punished in like manner as if they had knowingly and designedly, by false pretence or pretences, obtained any money, goods, wares, or merchandise, from any person or persons, with intent to cheat or defraud any person or persons of the same."[2]

§ 412. **7 & 8 Geo. 4.** — Following these statutes and repealing them, and repealing 33 Hen. 8, c. 1,[3] respecting privy false tokens,[4] came Stat. 7 & 8 Geo. 4, c. 29, § 53, since also repealed. It recites, that "a failure of justice frequently arises from the subtile distinction between larceny and fraud;"[5] and, for remedy thereof, enacts, "that, if any person shall, by any false pretence, obtain from any other person, any chattel, money, or valuable security, with intent to cheat or defraud any person of the same, every such offender shall be guilty of a misdemeanor," and pun-

Wilgus, 4 Pick. 177; Commonwealth *v.* Hulburt, 12 Met. 446.

[1] See 2 East P. C. 827.

[2] See 1 Hawk. P. C. Curw. ed. p. 321.

[3] Ante, § 143.

[4] 1 Deac. Crim. Law, 227. Strictly, the repeal was by 7 & 8 Geo. 4, c. 27.

[5] Ante, § 165, 166.

ished, &c.: "*provided*, *always*, that, if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor, . . . and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts."[1]

§ 413. **24 & 25 Vict.** — The statute at present in force in England is 24 & 25 Vict. c. 96, § 88 (A.D. 1861), as follows: "Whosoever shall by any false pretence obtain from any other person any chattel, money, or valuable security, with intent to defraud, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement. Provided, that, if upon the trial of any person indicted for such misdemeanor it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts; provided also, that it shall be sufficient in any indictment for obtaining or attempting to obtain any such property by false pretences to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud."

§ 414. **American.** — As already observed, the American enactments are copied in substance from the English, but there are more or less minor differences. It will not be best to occupy with them the very great space which they would fill should we introduce them; since every practitioner will have before him those of his own State, and such differences as are important to a general understanding of the subject will be pointed out as we

[1] See 2 Russ. Crimes, 3d Eng. ed. 287.

go along. From the cases cited in a preceding note,[1] and from a general doctrine of statutory interpretation,[2] we learn, that our courts should, and do, in expounding our own statutes, follow in a general way the English interpretations.

II. *What is a False Pretence.*

§ 415. **General Doctrine.** — These statutes, like all criminal ones, must, as against defendants, be construed strictly, and nothing not within their words be held to be within their meaning;[3] while, on the other hand, as the construction must be liberal in favor of defendants,[4] "there may be," in the language of Gross, J., "false pretences not within the statute."[5] Therefore the word "pretence," instead of being understood exactly in the popular sense, has obtained a legal and technical one,[6] which it is our purpose here to ascertain.

How defined. — In general terms, a false pretence was defined in a Massachusetts case to be, "a representation of some fact, or circumstance, calculated to mislead, which is not true."[7] A fuller and practically better definition would be: A false pretence is such a fraudulent representation of an existing or past fact, by one who knows it not to be true, as is adapted to induce the person to whom it is made to part with something of value.[8] And the offence discussed in this chapter is the obtaining of valuables by means of the false pretence.[9]

§ 416. **"Symbol or Token" — "Pretence."** — We saw, in a previous chapter, what is a false token or symbol.[10] Some American statutes employ the words "symbol or token," in connection with "pretence;"[11] and, in those statutes which do not, the

[1] Ante, § 410, note.

[2] Stat. Crimes, § 97, 242.

[3] Stat. Crimes, § 191 et seq.

[4] Stat. Crimes, § 133, 196, 227–231; Vol. I. § 586.

[5] Rex *v.* Fuller, 2 East P. C. 837. And see Stat. Crimes, § 133, 206; Vol I. § 585, 586.

[6] McKenzie *v.* The State, 6 Eng. 594. And see Stat. Crimes, § 268, 269.

[7] Commonwealth *v.* Drew, 19 Pick. 179, 184, by Morton J. And see Reg. *v.* Woolley, 1 Den. C. C. 559, 1 Eng. L. & Eq. 537, 4 New Sess. Cas. 341, Temp. & M. 279; Reg. *v.* Henderson, Car. & M. 328.

[8] And see The State *v.* Vanderbilt, 3 Dutcher, 328; Commonwealth *v.* Hutchinson, 1 Pa. Law Jour. Rep. 302; The State *v.* Evers, 49 Misso. 542; Scott *v.* People, 62 Barb. 62; The State *v.* Penley, 27 Conn. 587.

[9] The State *v.* Phifer, 65 N. C. 321 Bowler *v.* The State, 41 Missis. 570.

[10] Ante, § 145–158.

[11] See Commonwealth *v.* Henry, 10

latter word alone must doubtless be construed as co-extensive in signification with the three combined. For it is plain that whatever is a false symbol or false token is also a false pretence.[1]

§ 417. **"False" — Erroneous Belief.** — By the terms of the statutes the pretence must be "false."[2] And the doctrine undoubtedly is, that, if it is not false, though believed to be so by the person employing it, it is insufficient. Thus, if a man passes as good the note of a bank which has stopped payment, yet if there is found to be liable on it some party not a bankrupt, he cannot be convicted of this cheat.[3]

§ 418. **How many Pretences.** — But there need be only one false pretence; and, though several are set out in an indictment, yet, if any one of them is proved, — being such as truly amounts in law to a false pretence, — the indictment is sustained.[4]

Harris, Pa. 253; The State *v.* Layman, 8 Blackf. 330; People *v.* Gates, 13 Wend. 311.

[1] For example, compare ante, § 145–158, with The State *v.* Vanderbilt, 3 Dutcher, 328; Reg. *v.* Prince, Law Rep. 1 C. C. 150, 11 Cox C. C. 193.

[2] People *v.* Tompkins, 1 Parker C. C. 224.

[3] Rex *v.* Spencer, 3 Car. & P. 420. **Passing Bad Money.** — This was a *nisi prius* case; and Gaselee, J. said: "On this evidence the prisoner must be acquitted; because, as it appears that the note may ultimately be paid, I cannot say that the prisoner was guilty of a fraud in passing it away." It will be observed, that, in this case, the evidence failed to prove even a depreciation in the intrinsic value of the note. It seems to me that the pretence might be false, and as such sufficient within the statute, though the note was not worthless; as, suppose it was really of half of its nominal value, yet passed on the representation of its being of full value; but the prosecutor, to convict, must prove this depreciation of value. And I think this view is sustained by judicial dicta, taken in connection with the case itself, in Reg. *v.* Evans, Bell C. C. 187, 8 Cox C. C. 257, particularly as reported by Bell. There a £5 note was passed; the note was proved to be that of a private bank no longer in existence, which had paid a dividend of 2*s.* 4*d.* in the pound; and a neighboring bank had refused to change it. The chairman of the sessions, at the trial, had submitted it to the jury to determine, as a ground for their verdict, whether the note was, or not, of no value. And the judges held, that the case had not been correctly submitted. Said Pollock, C. B.: "Probably this case might have been left to the jury in such a way that the verdict of guilty might have warranted the sustaining of the conviction. Had the prisoner represented the note to be of £5 value when she knew it was not of that value, and the jury had found the false pretence, and that the note was of less value than the £5 to her knowledge, it would have been sufficient to sustain a verdict of guilty." p. 191. S. P. by Crowder, J. p. 192. It was likewise held in Massachusetts, that the passing of a bill of a broken bank at its nominal value, by one who represents it to be of such value, yet knows it to be nearly if not quite worthless, is an indictable false pretence under the statute, although the bill may be of some value. Commonwealth *v.* Stone, 4 Met. 43.

[4] The State *v.* Dunlap, 24 Maine, 77; The State *v.* Mills, 17 Maine, 211; People *v.* Haynes, 14 Wend. 546; Reg. *v.* Hewgill, Dears. 315, 24 Eng. L. & Eq. 556; Bielschofsky *v.* People, 5 Thomp & C. 277; Crim. Proced. II. § 171.

§ 419. **Promise.** — A promise is not a pretence.[1] And if a man says, that he will do an act, which he does not mean to do, — as that he will pay for goods on delivery, his purpose being to defraud the seller of them, — the case is not within the statute.[2] Thus also, —

"**Would tell.**" — An allegation in an indictment, that the defendant falsely pretended he "would tell" the prosecutor where certain strayed animals were, on being paid a sovereign down, was held insufficient. The proof was, that he pretended he knew and would tell; and, the judges said, the indictment should have stated that he pretended to know, in which case the conviction would have been sustained.[3] Again, —

"**Will.**" — A pretence by the defendant that he will pay over moneys which he may receive,[4] or will make an assignment of a particular *chose in action*, is insufficient, because it is merely a promise;[5] as is also the pretence, the defendant being a physician, that he will cure a person of the pox in three weeks.[6]

§ 420. **Future Event.** — And both in the nature of things, and in actual adjudication, the doctrine is, that no representation of a future event, whether in the form of a promise or not, can be a pretence within the statute; for it must relate either to the past or to the present.[7] Thus, —

"**About to have,**" **&c.** — A representation, that the party to whom it is made is about to have his goods and chattels attached, is insufficient.[8]

Distinguished from Pretence as to the Present. — But where the pretence was, that the one making it had a warrant to arrest the defrauded person's daughter for a public offence, punishable

[1] Ryan *v.* The State, 45 Ga. 128; Reg. *v.* Gemmell, 26 U. C. Q. B. 312; The State *v.* Evers, 49 Misso. 542; Colly *v.* The State, 55 Ala. 85; Reg. *v.* Woodman, 14 Cox C. C. 179.

[2] Rex *v.* Goodhall, Russ. & Ry. 461. **Not meaning to pay.** — Merely to buy goods without the expectation of paying for them does not constitute an indictable false pretence. Tefft *v.* Windsor, 17 Mich. 486.

[3] Rex *v.* Douglas, 1 Moody, 462. And see Commonwealth *v.* Hutchinson, 1 Pa. Law Jour. Rep. 302; Commonwealth *v.* Hickey, 1 Pa. Law Jour. Rep. 437.

[4] Glackan *v.* Commonwealth, 3 Met. Ky. 232.

[5] McKenzie *v.* The State, 6 Eng. 594. See Reg. *v.* Burgon, Dears. & B. 11, 36 Eng. L. & Eq. 615.

[6] Rex *v.* Bradford, 1 Ld. Raym. 366.

[7] Rex *v.* Parker, 7 Car. & P. 825, 2 Moody, 1; Commonwealth *v.* Drew, 19 Pick. 179; McKenzie *v.* The State, 6 Eng. 594; Burrow *v.* The State, 7 Eng. 65; Dillingham *v.* The State, 5 Ohio State, 280. And see Reg. *v.* Woolley, 1 Den. C. C. 559, 1 Eng. L. & Eq. 537; Reg. *v.* Henderson, Car. & M. 328.

[8] Burrow *v.* The State, 7 Eng. 65. And see People *v.* Williams, 4 Hill, N.Y. 9.

by fine and imprisonment, whereby he obtained valuables of the latter, the case was held to be within the statute.[1]

§ 421. **Pretence and Promise further distinguished.** — There are circumstances of great practical difficulty in applying the distinctions mentioned in the last two sections. Thus, —

Check and no Funds — Post-dated. — While the general proposition is clear, that it is a false pretence to profess untruly to have funds with a banker, and to draw and deliver a check for them,[2] there occurred the following case, on which the English judges were divided: The prisoner, on purchasing an article for which he was to pay cash, represented he had money in a particular bank; but for his own accommodation post-dated his check, the seller consenting to receive it thus; and said, that it was good and it would be paid on the day of its date, — all of which was, as he knew, false. He was convicted by the jury; and a majority of the judges held the conviction right, on a count which charged him with having falsely pretended that the check "was a good and genuine order for £25, and of the value of £25."[3] Again, —

§ 422. **Promise to marry — Pretence of being Unmarried.** — Where the pretence was made by a man to a woman, that he intended to marry her, on a day agreed between them; and thereby he got from her money to pay for his wedding suit which he had purchased, and for furniture which he said he was going to purchase; this was held by all the English judges to be insufficient.[4] But where the pretence, which was false, was that the prisoner *was unmarried*, coupled with the promise to marry the woman, this was held to be sufficient.[5] And, —

§ 423. **Having Money.** — Where the prisoner had obtained from the accommodation acceptor of his bill for £2,600 a loan of £250 toward taking it up, on the pretence of having the remainder of the money himself, while in truth he had but £300, Patteson, J., considered the case to be within the statute; though, as the prisoner was acquitted, it never went before the other judges.[6]

[1] Commonwealth *v.* Henry, 10 Harris, Pa. 253. See, on this point, People *v.* Stetson, 4 Barb. 151, stated post, § 468.

[2] Rex *v.* Jackson, 3 Camp. 370; Smith *v.* People, 47 N. Y. 303; Foote *v.* People, 17 Hun, 218; Reg. *v.* Hazelton, Law Rep. 2 C. C. 134.

[3] Rex *v.* Parker, 7 Car. & P. 825, 2 Moody, 1. And see Reg. *v.* Hughes, 1 Fost. & F. 355.

[4] Reg. *v.* Johnston, 2 Moody, 254. See post, § 445.

[5] Reg. *v.* Jennison, 1 Leigh & C. 157.

[6] Rex *v.* Crossley, 2 Moody & R. 17, 2

§ 424. **Promise coupled with Existing Fact.** — And this leads us to the proposition, that, though there is a promise connected with the pretence of an existing fact, this promise does not take the case out of the statute. It is, as to the criminal consequence, a mere nullity. If there is a sufficient pretence of a false existing or past fact, the consequence attached to it by the law is not overthrown by the promise; if there is not a sufficient pretence of this sort, the promise does not supply the defect.[1]

Lewin, 164. The case of Rex *v.* Asterley, 7 Car. & P. 191, in which the prosecution succeeded, contains also a mixture of promise and pretence. So also The State *v.* Rowley, 12 Conn. 101; Young *v.* Rex, 3 T. R. 98.

[1] 1. The reader will find stated, in our first volume, much to illustrate this proposition; as, for example, at § 264, 338, 339, 774 et seq., 819. In the case of Reg. *v.* Jennison, Leigh & C. 157, mentioned in the section before the last, where it was held, that, though a false promise of marriage is not a false pretence, yet a false representation of being unmarried is, Erle, C. J., giving the opinion of himself and the rest of the judges, said: "Now, it is clear that a false promise cannot be the subject of an indictment for obtaining money by false pretences. Here, however, we have the pretence that he [the prisoner] was an unmarried man. This was false in fact, and was essential; for, without it, he would not have obtained the money. Then this false fact by which the money is obtained will sustain the indictment, although it is united with two false promises, neither of which alone would have supported the conviction." p. 158.

2. The New York commissioners proposed so to change the terms of the statute that it shall read as follows: "Every person who, with intent to cheat or defraud another, designedly, by color *or aid* of any false token, &c., obtains," &c. And they say, that the words "color or aid" are suggested to be used in the place of the single word "color," as found in the present statute, for the purpose of meeting a decision, which, with their comments upon it, I will state in their own language: "It is held, that though the false pretence need not be the *only* inducement influential with the injured party, it must be the *controlling* one. People *v.* Crissie, 4 Denio, 525; see also People *v.* Haynes, 11 Wend. 557; People *v.* Herrick, 13 Wend. 87. This rule sometimes leads to a failure of justice; as, for instance, in the late case of Ranney *v.* People, 22 N. Y. 413. In that case the accused represented to one Hock that he had employment for him at a distance in travelling to collect money and do other business; and he promised to give him certain wages therefor, upon condition that Hock should deposit with the accused one hundred dollars as security for his faithful performance of the duty. It was held, that, although the representation and promise were false and fraudulent, an indictment could not be sustained. 'There must be,' say the court, 'a direct and positive false assertion as to some existing matter by which the victim is induced to part with his money or property. In this case the material thing was the promise of the accused to employ the person defrauded and to pay him for his services. There was a statement, it is true, that the prisoner had employment which he could give to Hock; but this was obviously of no importance without the contract which was made. The false representation complained of was, therefore, essentially promissory in its nature, and this has never been held to be the foundation of a criminal charge.' The commissioners doubt the soundness of this decision, even under the existing law. See Reg. *v.* Bates, 3 Cox C. C. 201, where it is held that an indictment which charges a false pretence of an existing fact calculated to induce the confidence which led to the

As influencing the Prosecutor. — The pretence may, on familiar principles,[1] be sufficient, though, in the particular instance, the prosecutor would not have yielded to it had there not been also a promise; as, if a sick man is struck by a blow which would have done him no harm had he been well, yet the blow takes his life, the person who committed the homicide is just as guilty as if, the man being well, he had co-operated with another's muscular power, instead of the invisible agency disease, in bringing about the death. Yet we are here approaching a doctrine to be elucidated further on, namely, that the cheat must have been actually effected by the false pretence, in distinction from another and independent cause.[2]

§ 425. **Further of Promise coupled with Fact.** — These nice distinctions may be further shown as follows: —

Having Rent to pay. — In one case, the prisoner, who, it was understood, and truly, owed rent, representing that he had the rent to pay borrowed some money; but he did not mean to pay the rent, and did not pay it; and the judges held his conviction to be wrong.[3] Here, the pretence was, that he owed the rent; and this was true; therefore the decision was plainly correct.

About to receive Money. — In another case, the prisoner's representation was, that a third person owed him, but he did not say how much, and nothing appeared as to the ability of the alleged

prosecutor's parting with his property, though mixed up with false pretences as to the prisoner's future conduct, is sufficient. Where the false pretence is as to the *status* of the party at the time, or as to any collateral fact supposed to be then existing, it will equally support an indictment under the statute. See also Reg. *v.* Burnsides, 8 Cox C. C. 370 [s. c. Bell C. C. 282], where the indictment charged that the prisoner falsely pretended to the prosecutor that a certain person who lived in a large house down the street, and had a daughter married some time back, had been at him, the prisoner, about some carpet, to wit, about twelve yards, by which, &c.; whereas no person had been at the prisoner about any carpet, nor had any such person asked the prisoner to procure any piece of woollen carpet; and the evidence was, that the prisoner stated to the prosecutor that he wanted some carpeting for a family in a large house in the village, who had a daughter lately married, and thereby obtained twenty yards of carpet from him; and it was held that there was a sufficient false pretence alleged." Draft of a Penal Code, A.D. 1864, p. 223–225.

3. As general exposition of the criminal law, it is safe to state, that, when a particular forbidden cause contributes to the effect which renders a party punishable, we do not inquire whether it acted alone, or in concert with something else. Did the cause contribute? If it did, the law regards it as having done the thing, the same as though it operated alone. And see, for illustrations of this doctrine, Vol. I. § 212 et seq., 628 et seq., and various other places.

[1] See the last note.

[2] Post, § 461.

[3] Reg. *v.* Lee, Leigh & C. 309.

debtor to pay. And this was held not to be a sufficient false pretence; but the main ground of the decision was, that an indefinite indebtedness from a person of unknown means was not such a fact as, if it were true, would induce any person of ordinary prudence to part with his money; therefore the pretence could not be deemed a means by which the fraud was effected.[1]

§ 426. **Owning Property — (Mortgage).** — Where a man obtained a loan of money on the false representation that a house had been built on his land, and he would execute a mortgage thereon for the money, the case was held to be within the statute, notwithstanding there was no mortgage made when the money was got; but, instead thereof, there was given an obligation to execute a mortgage afterward.[2] In like manner, it is a sufficient false pretence for one to represent untruly, that he owns some articles of personal property, and thus to obtain a loan which he in form secures by a mortgage on the property.[3]

§ 427. **Pretence and Promise influencing Mind together.** — According to the facts of perhaps most cases, the representation extends more or less into the field of promise, as certainly the parting with the property extends into the field of hope. And if there is a sufficient false pretence of an existing or past fact, as already defined, blended nevertheless with a promise for the future, the pretence is still sufficient, as already mentioned.[4] And — a point which perhaps belongs further on in our discussion — the English judges have held, that, where the pretence and the promise, blended together, acted jointly on the mind of the defrauded person as the inducement to part with his goods, and he would not have parted with them by reason of the pretence alone without the promise, the case falls still within the statute.[5] If this doctrine seems, at the first impression, to carry the law far toward the shadowy ground of mere promise, a single consideration, added to what has already been said, shows that it does not carry it over the line. Were a promise not permitted to intervene between the pretence and the cheat, without destroying the indictable quality of the transaction, the statute itself would

[1] The State *v.* Magee, 11 Ind. 154.

[2] Reg. *v.* Burgon, Dears. & B. 11, 7 Cox C. C. 131, 36 Eng. L. & Eq. 615. See post, § 444.

[3] Commonwealth *v.* Lincoln, 11 Allen, 233. See also post, § 444.

[4] Ante, § 419–425.

[5] Reg. *v.* West, Dears. & B. 575, 8 Cox C. C. 12; Reg. *v.* Fry, Dears. & B. 449, 7 Cox C. C. 394.

be rendered almost null. And no construction of any statute is allowable, the consequence of which is to nullify it.[1] When a man says on his oath, that, without the promise, he should not have parted with his goods, he says nothing legally different from the assertion, that, if the defendant had not asked him for them, he should not have let them go. The request is not a pretence, yet without it the goods would not have gone; the promise is not a pretence, yet without it the goods would not have gone. These are things not to be taken into the account. Would the prosecutor have parted with his goods without the pretence? did the pretence so operate with the request and the promise as to defraud him of them? — these are the relevant questions.[2]

§ 428. **False Affirmation.** — Another distinction, perhaps substantial, but a little thinner than the last, is between a false pretence and a false affirmation, the latter not being sufficient.[3]

False Excuse. — And, on a like distinction, when a man, accustomed to receive parochial relief, was told by an overseer of the poor to go to work and help maintain his family, but said he could not because he had no shoes; whereupon he was supplied with a pair, while in truth he had two pairs previously received of the parish, — the judges held the conviction against him to be wrong; "the statement made by the prisoner being rather a false excuse for not working, than a false pretence to obtain goods."[4]

§ 429. **Fact as distinguished from Opinion, &c.** — The general idea, in part developed in the foregoing sections, is, that the false pretence must be of some existing fact, in distinction alike from a mere promise and a mere opinion, and this fact must be such in its nature as is known to the person employing the pretence.[5] Therefore, —

Sum due. — An indictment, alleging that the defendant falsely pretended a sum of money, parcel of a certain larger sum, was

[1] Stat. Crimes, § 82.

[2] See also ante, § 424 and note, 425; post, § 461.

[3] Rex *v.* Reed, 7 Car. & P. 848. The law of this case, which was decided by all the judges, is so connected with a question of pleading, that, since there are no reasons given in the opinion, it is not much to be relied upon as an authority. See also post, § 429, 432; Commonwealth *v.* Norton, 11 Allen, 266; The State *v.* Penley, 27 Conn. 587.

[4] Rex *v.* Wakeling, Russ. & Ry. 504.

[5] People *v.* Tompkins, 1 Parker C. C. 224, 238; Johnson *v.* The State, 41 Texas, 65; The State *v.* Webb, 26 Iowa, 262; The State *v.* Hefner, 84 N. C. 751; People *v.* Jacobs, 35 Mich. 36.

"due and owing" to him for work which he had executed for the persons to whom the pretence was made, whereby, &c., was held not to be sufficient. The allegation was not of a false pretence of an existing fact; because it might be satisfied in the proof by showing a mere opinion concerning facts complicated with questions of law.[1] And, —

"Did not think." — Where a broker, negotiating a mortgage, falsely declared that he did not think his principal would take less than a sum named, the majority of the judges deemed that an indictment would not lie.[2] Also, —

Value of Business. — The like was ruled, by Byles, J., of a false representation of the value of a business.[3] This, it is perceived, is in substance mere opinion. But, —

Soundness of Horse. — A representation that a horse is sound, by one who knows it not to be, is, within the statute, indictable.[4]

How distinguish. — In cases like these, there is always a point at which mere opinion ends and fact begins. Doubtless there may be expressions about the value of a business, or what one's principal will do, and certainly there may be as to what sum is due, which will be adequate false pretences; and there may be expressions as to the soundness of a horse, not adequate. Plainly the test must be the common sense of judge and jury, applied to the special facts of each case.

§ 429 *a*. Pretensions to Power. — If one pretends to possess the power to do something, whether natural or supernatural, while conscious he has it not, — is this mere opinion, or is it a false pretence? It is deemed, in some English cases, perhaps correctly, to be the latter. Thus, —

Bring back Husband. — A wife having been deserted by her husband, the defendant, a woman, pretended to her, that, by the use of "a certain stuff," she could bring him back "over hedges and ditches." "She said she was what they called the Cunning Woman, and there was not another woman such as her about handy." The deserted wife paid the fee, but the husband did not return until she went for him; and it was held that an indictment would lie. If the defendant had really believed that

[1] Reg. *v.* Oates, Dears. 459, 29 Eng. L. & Eq. 552, 6 Cox C. C. 540, 24 Law J. N. S. M. C. 123, 1 Jur. N. S. 429, 3 Com. Law, 661; Reese *v.* Wyman, 9 Ga. 430. See post, § 454–457.

[2] Scott *v.* People, 62 Barb. 62.

[3] Reg. *v.* Williamson, 11 Cox C. C. 328. See post, § 438.

[4] The State *v.* Stanley, 64 Maine, 157 post, § 453.

she possessed the power claimed, the prosecution, it was conceded, could not have been maintained.[1]

Witchcraft. — And it has been ruled that a gypsy, obtaining money under the pretence of practising witchcraft, is indictable — for false pretence or for larceny.[2]

§ 430. **Need not be in Words.** — Again; the pretence need not be in words, but it may be sufficiently gathered from the acts and conduct of the party.[3]

Appearing in Cap and Gown. — If, therefore, at Oxford, in England, a person, not a member of the University, goes to a shop for the purpose of fraud, wearing a commoner's cap and gown, and gets goods; this appearing in a cap and gown is a sufficient false pretence of being a member of the University to satisfy the statute, although nothing verbal passed.[4]

Uttering. — And the fact of uttering a counterfeit note, as a genuine one, is tantamount to a representation of its being genuine.[5] Moreover, in the language of Robinson, C. J., "When a person tenders to another a promissory note of a third party, in exchange for money or goods, although he may say nothing upon the subject, yet he should be taken by his conduct to affirm or pretend that the note has not to his knowledge been paid, either wholly or to such an extent as has almost destroyed its value, leaving only such a trifling sum due as would make the note a wholly inadequate consideration for what was obtained in exchange."[6]

§ 431. **Different Conversations connected.** — Where the representation is in words, and there are conversations at different times, they may be connected to show a false pretence, though what was said on any one occasion would not be alone sufficient. And the question is for the jury, whether the different conversations can be so connected as to constitute one transaction.[7]

[1] Reg. *v.* Giles, Leigh & C. 502, 10 Cox C. C. 44.

[2] Reg. *v.* Bunce, 1 Fost. & F. 523.

[3] Rex *v.* Freeth, Russ. & Ry. 127; Reg. *v.* Copeland, Car. & M. 516; Rex *v.* Story, Russ. & Ry. 81; Commonwealth *v.* Drew, 19 Pick. 179; Reg. *v.* Giles, Leigh & C. 502, 10 Cox C. C. 44; Reg. *v.* Partridge, 6 Cox C. C. 182.

[4] Rex *v.* Barnard, 7 Car. & P. 784.

[5] Rex *v.* Freeth, Russ. & Ry. 127. And see Reg. *v.* Ball, Car. & M. 249; Reg. *v.* Evans, Bell C. C. 187, 8 Cox C. C. 257; Commonwealth *v.* Nason, 9 Gray, 125; Cheek *v.* The State, 1 Coldw. 172; Maley *v.* The State, 31 Ind. 192.

[6] Reg. *v.* Davis, 18 U. C. Q. B. 180, 184. And see Lesser *v.* People, 73 N. Y. 78.

[7] Reg. *v.* Welman, Dears. 188, 20 Eng. L. & Eq. 588, 22 Law J. N. S. M. C. 118, 17 Jur. 421.

§ 432. **Proximate to the Fraud.** — Another proposition is, that the pretence must be of some matter sufficiently proximate to the obtaining of the goods. Therefore, —

Contract intervening. — Where one had falsely represented that he was a naval officer; "upon which he made with the prosecutrix a contract for board and lodging, at the rate of one guinea a week, and he was lodged and fed as the result of the contract;" the pretence was held not to be sufficient. "We are of opinion," said Jervis, C. J., "that the conviction was not right, because we think that the supply of articles, as it was said, upon the contract made by reason of the false pretence was too remotely the result of the false pretence in this particular instance to become the subject of an indictment for obtaining those specified goods by false pretences." [1] Yet the mere fact of a contract intervening between the pretence and the consummated fraud, does not of itself take away the indictable quality of the transaction.[2]

§ 432 *a*. **Known equally to both Parties.** — It appears to be laid down in Massachusetts, that, in the language of the judge, "a wilfully false affirmation, made to a party who had like means of knowledge whether the affirmation was true or false as the party who made it," is not such a false pretence as will sustain an indictment, though within the terms of the statute. In its interpretation, it ought to be restricted. Therefore, —

Pretending wrong Change. — To obtain money of a trader by pretending that on a previous occasion he had not returned adequate change is not indictable. "The case," said the judge, "was one of a demand of money as of right, growing out of what might have been an illegal sale of liquors, and was yielded to by the seller, he being personally connected with all the alleged facts, and voluntarily submitting to the demand thus made upon him. . . . We are aware," he continued, "that some of the English judges have given a more extended construction of their statute in cases that have there arisen." [3]

How in Principle. — To the present author, it seems impossible to imagine a case more completely within the spirit of the statute than this, while it is admitted to be within its letter. A person constantly making change to customers, and one taking

[1] Reg. *v.* Gardner, Dears. & B. 40, 46, 7 Cox C. C. 136, 36 Eng. L. & Eq. 640. But see post, § 483.

[2] Post, § 483.

[3] Commonwealth *v.* Norton, 11 Allen, 266, 267, 268.

it in a single instance, stand on entirely unequal ground, both because the former cannot be expected to remember the instance while the latter can, and because the former has parted with the change while the latter has it constantly in possession to count and recount as often as he chooses. And there is no villany more deserving of reprehension, or more detrimental to confidence in trade, than for one, taking advantage of an honest purpose, to get money by a trick of this nature.[1]

§ 433. **Shallow Devices.** — There remains one question not quite free from difficulty. We saw, in the preceding volume,[2] that, as a general proposition, the criminal law is not administered on the plan of giving a particular protection to the weak and feeble; and we shall presently see,[3] that a false pretence, to be indictable otherwise than as an attempt,[4] must be successful. It is plain, therefore, that a device so shallow as to be incapable of imposing on any person, cannot constitute a false pretence. But must the pretence be such as is calculated to mislead men of ordinary prudence? Some of the older cases lay down the doctrine that it must.[5] But, in reason, and it is believed according to the better modern authorities, a pretence calculated to mislead a weak mind, if practised on such a mind, is just as obnoxious to the law as one calculated to overcome a strong mind, practised on the latter. Thus, —

§ 434. **Weak Mind.** — Caton, J., in an Illinois case, observed: "Should an article, the essential value of which consisted in its color, be offered to a person fully possessed of the sense of sight, and with every opportunity for inspection, with the pretence that it was white when in fact it was black, under such circumstances the false pretence might be very innocent, because it was not calculated to deceive; while the same pretence made to a blind person would be calculated to deceive, and might subject the party to punishment."[6] And the same truth is applicable to the possession and lack of the other faculties of the human understanding. Therefore, —

[1] And see post, § 435.

[2] Vol. I. § 251, 585.

[3] Post, § 460.

[4] Post, § 488.

[5] The State *v.* Simpson, 3 Hawks, 620; Commonwealth *v.* Wilgus, 4 Pick. 177, 178; People *v.* Haynes, 11 Wend. 557, 14 Wend. 549, note; People *v.* Williams, 4 Hill, N. Y. 9; Skiff *v.* People, 2 Parker C. C. 139, 147. Contra, Chancellor Walworth in People *v.* Haynes, 14 Wend. 546, 557. And see Moore *v.* Turbeville, 2 Bibb, 602; ante, § 425.

[6] Cowen *v.* People, 14 Ill. 348. And

Ordinary Prudence. — The doctrine, that, in the language of Russell, the pretence "need not be such an artificial device as will impose upon a man of ordinary caution," is fully established, at least in the English courts. At the same time there may be devices too frivolous for the law to notice.[1] And the pretence need not be such — a proposition not essentially differing from the last — as cannot be guarded against by common prudence.[2]

§ 435. **Carelessness — (Cheat in making Change).** — This doctrine has been carried so far in England, that, when a man passed out to another, for change, a bank-note, saying it was for £5, when really it was, as he knew, for only £1, and received the change as for a £5 note, he was held to have committed this offence, though the person to whom he passed the note could read. Said Lord Campbell, C. J.: "We are all of opinion that the conviction was right. In many cases, a person giving change would not look at the note; but, being told it was a £5 note and asked for change, would believe the statement of the party offering the note, and change it. Then, if, giving faith to the false representation, the change is given, the money is obtained by false pretences."[3]

§ 436. **How in Principle, as to Shallow Devices, Weak Minds, &c.** — Practically, it is impossible to estimate a false pretence, otherwise than by its effect. It is not an absolute thing, to be handled and weighed as so much material substance; it is a breath issuing from the mouth of a man, and no one can know what it will accomplish except as he sees what in fact it does. Of the millions of men on our earth, there is not one who would not be pronounced by the rest to hold some opinion, or to be influenced in some affair, in consequence of considerations not adapted to affect any mind of ordinary judgment and discretion. And no man of business is so wary as never to commit, in a single instance, a mistake such as any jury would say on their oath

see Reg. *v.* Coulson, 1 Eng. L. & Eq. 550, Temp. & M. 332, 1 Den. C. C. 592, 14 Jur. 557.

[1] 2 Russ. Crimes, 3d Eng. ed. 289, and see the note of Mr. Greaves; Reg. *v.* Woolley, 1 Eng. L. & Eq. 537, 1 Den. C. C. 559, 4 New Sess. Cas. 341, Temp. & M. 279. And see Reg. *v.* Smith, 1 Den. C. C. 510, 2 Car. & K. 882, Temp. & M. 214.

[2] The State *v.* Mills, 17 Maine, 211; Reg. *v.* Woolley, supra; Rex *v.* Freeth, Russ. & Ry. 127; Smith *v.* People, 47 N. Y. 303, 307; People *v.* Pray, 1 Mich. N. P. 69; Hamilton *v.* Reg. 2 Cox C. C. 11, 15; Colbert *v.* The State, 1 Texas Ap. 314.

[3] Reg. *v.* Jessop, Dears. & B. 442, 7 Cox C. C. 399. Compare this with ante, § 432 *a*.

could not be done by a man of ordinary judgment and discretion. These things being so, plainly a court cannot, with due regard to the facts of human life, direct a jury to weigh a pretence, an argument, an inducement to action, in any other scale than that of its effect.

§ 437. *Further Illustrations of False Pretences:* —

Pecuniary Condition. — With these general principles before us, we may profitably look at some further illustrations of false pretences. A common instance is where one represents himself or his firm to be in a sound pecuniary condition, or to owe only so much,[1] or to be worth so much money, knowing the facts are otherwise;[2] or falsely pretends to have a particular fund in his own hands[3] or another's;[4] whereby he gains a credit.

§ 438. **Business, Social Standing, &c.** — Or the representation may be concerning his business, situation, or standing in life, as in the instance already mentioned[5] of pretending to be a member of the university. Again, where the defendant said untruly that he was a captain of the 5th Dragoons, the indictment was held good.[6] And the false pretences of carrying on an extensive business as auctioneer and house agent,[7] of being a chaplain in the army in need of money,[8] and of being a married woman living with her husband, and authorized to pledge his credit, while in fact she is living apart from him on a separate maintenance,[9] have been severally held to be sufficient.

[1] The State *v.* Pryor, 30 Ind. 350.

[2] Commonwealth *v.* Davidson, 1 Cush. 33; People *v.* Haynes, 11 Wend. 557; Reg. *v.* Howarth, 11 Cox C. C. 588; Commonwealth *v.* Poulson, 4 Pa. Law Jour. Rep. 20. Such a representation, falsely made, was held not to be within the statute in Vermont, whereby, "If any person shall by false tokens, messages, letters, or by other fraudulent, swindling, or deceitful practices, obtain or procure from any person or persons any money, goods, or chattels," he shall be punished, &c. The court considered that the words "other fraudulent," &c., were added, not to enlarge the definition of the offence from positive acts to mere declarations, but to extend the meaning to all other cases of the like nature with those mentioned previously. The State *v.* Sumner, 10 Vt. 587. And see Stat. Crimes, § 245, 246.

[3] Commonwealth *v.* Burdick, 2 Barr, 163; People *v.* Kendall, 25 Wend. 399; Reg. *v.* Henderson, Car. & M. 328; Rex *v.* Crossley, 2 Moody & R. 17, 2 Lewin, 164; Reg. *v.* Adamson, 1 Car. & K. 192, 2 Moody, 286.

[4] People *v.* Herrick, 13 Wend. 87, The State *v.* Reidel, 26 Iowa, 430.

[5] Ante, § 430; Rex *v.* Barnard, 7 Car. & P. 784.

[6] Hamilton *v.* Reg. 9 Q. B. 271, 16 Law J. N. S. M. C. 6. See ante, § 432. A case of misrepresenting the business connections is Reg. *v.* Archer, Dears. 449, 1 Jur. N. S. 479, 33 Eng. L. & Eq. 528, 6 Cox C. C. 515.

[7] Reg. *v.* Crab, 18 Law Times, N. S. 370, 11 Cox C. C. 85. And see Commonwealth *v.* Jeffries, 7 Allen, 548.

[8] Thomas *v.* People, 34 N. Y. 351.

[9] Reg. *v.* Davis, 11 Cox C. C. 181.

§ 439. **False Personating.** — The false personating of another, concerning which we have seen,[1] there was doubt under the ancient common law and the false-token statute of Hen. 8, is a false pretence. Thus, where one, to obtain money, falsely represented himself to be Mr. H. who had cured Mrs. C. at the Oxford Infirmary, he was held to be indictable for the cheat effected thereby.[2]

§ 440. **Assuming False Name.** — And so, generally, is the assuming of a false name,[3] or even of a fictitious one, a false pretence, though here, as in all the other cases of cheating by false pretences, there must be the necessary fraud effected by the act.[4] Consequently, —

Money Order. — Where a person with a money order upon a post-office, falsely assumed to be the individual mentioned in it, and so got it cashed, he was held to have committed this offence; notwithstanding, when he received the money, he signed his real name, which was Story, while the name mentioned in the order was Storer.[5]

§ 441. **Being authorized.** — So, although a representation, which is untrue, of being authorized to get money or goods for a person is not a false token,[6] it is a false pretence.[7]

Forged Order. — *A fortiori*, this is so also, if the party making the representation carries with him, as from the other, a forged order.[8]

§ 442. **Sum due — False Accounts, &c.** — And where the secretary of an Odd Fellows' lodge, by the mere naked falsehood of telling a member he owed the lodge 13*s.* 9*d.*, obtained that sum of him fraudulently, whereas the amount owed was only 2*s.* 2*d.*, he was held to be rightly convicted of getting money under a

[1] Ante, § 152–155.

[2] Rex *v.* Bloomfield, Car. & M. 537.

[3] Commonwealth *v.* Wilgus, 4 Pick. 177.

[4] Post, § 460, 461; Commonwealth *v.* Drew, 19 Pick. 179.

[5] Rex *v.* Story, Russ. & Ry. 81. And see People *v.* Peacock, 6 Cow. 72.

[6] Ante, § 145.

[7] People *v.* Johnson, 12 Johns. 292; Commonwealth *v* Hulbert, 12 Met. 446; Reg. *v.* Davis, 11 Cox C. C. 181; McCorkle *v.* The State, 1 Coldw. 333; Reg. *v.* Robinson, 9 L. Canada, 278. See Reg. *v.* Tully, 9 Car. & P. 227; Chapman *v.* The State, 2 Head, 36, post, § 458.

[8] Tyler *v.* The State, 2 Humph. 37. And see Rex *v.* Cartwright, Russ. & Ry. 106. Of course, if the uttering is, as in some States, a statutory felony, an indictment for false pretences cannot be maintained where this cheat is only a misdemeanor; Vol. I. § 815; unless there is a provision in the statute, like that in the present English one, ante, § 412, 413, to meet the case.

false pretence.[1] Various other cheats, by false representations of the sum due, by false accounts, and the like, have been held to be indictable false pretences.[2]

Weight. — Moreover, it appears that a mere false representation of the weight of an article sold is a sufficient false pretence.[3]

§ 443. **Further as to Weight.** — On the latter question, some interesting cases have arisen. Thus, where the prisoner had sold a load of coal to the prosecutor, representing its weight to be so many pounds, while he knew it was less, and he had so packed the coal in his cart as to make it appear to be of larger bulk than it was, the pretence was held to be sufficient.[4] In another case, the prisoner, selling loads of soot by weight, had them weighed at a distance from the place of delivery, and brought with him tickets of their weight; but, subsequently to their being weighed, he lightened the loads. And he was held to be rightly convicted. "Suppose," said Pollock, C. B., "a man offers a basket of apples for sale, and, on being asked what quantity there is, says, 'Two bushels,' and is paid for them at the rate of so much a bushel, would he not be indictable if the upper part of the basket only contained apples, and the lower part sand and cinders?"[5] The distinction seems to be, that,

[1] Reg. *v.* Woolley, 1 Eng. L. & Eq. 537, 1 Den. C. C. 559, Temp. & M. 279, 4 New Sess. Cas. 341. See ante, § 429, for a case almost like this, where the contrary result was obtained. And see Reg. *v.* Prince, Law Rep. 1 C. C. 150, 11 Cox C. C. 193.

[2] Reg. *v.* Steels, 11 Cox C. C. 5; Reg. *v.* Leonard, 1 Den. C. C. 304, 3 Cox C. C. 284, 2 Car. & K. 514; Reg. *v.* Cooke, 1 Fost. & F. 64; Reg. *v.* Cooke, Law Rep. 1 C. C. 295, 12 Cox C. C. 10, 2 Eng. Rep. 167; Reg. *v.* Byrne, 10 Cox C. C. 369. See Reg. *v.* Butcher, Bell C. C. 6, 8 Cox C. C. 77.

[3] Rex *v.* Reed, 7 Car. & P. 848; Reg. *v.* Sherwood, Dears. & B. 251, 7 Cox C. C. 270, 40 Eng. L. & Eq. 584.

[4] Reg. *v.* Ragg, Bell C. C. 214, 217, 8 Cox C. C. 262; Erle, C. J., observing: "There was a false representation that there were 15 cwt. of coals in the cart when there were only about 8 cwt.; so that, as to 7 cwt., there was a pretence of a delivery which was altogether false, and, although the falsehood related only to a part of the entire quantity to be delivered, yet, as to that part, such a case has been held to be within the class where payment for goods is obtained by a pretence of a delivery which is false as to the entire quantity that was to have been delivered. This is a false pretence of a matter of fact cognizable by the senses." And see, as confirming this case, Reg. *v.* Kerrigan, Leigh & C. 383.

[5] Reg. *v.* Lee, Leigh & C. 418. The reporter in this case refers to Reg. *v.* Ridgway, 3 Fost. & F. 838, where Bramwell, B., observed: "If a man is selling an article, such as a load of coal, for a lump sum, and makes a false statement as to its weight or quantity for the purpose of inducing the intended purchaser to complete the bargain, that is not a false pretence within the statute. But if he is selling it by the quantity, and says there is a greater quantity than there

aside from any element of special device, if a man says a quantity of stuff he is offering for sale measures so much, or weighs so many pounds, and the purchaser buys it, relying on the representation, which the seller knows to be false, the pretence is within the statute. But if the sale is in lump, and the seller merely expresses an opinion as to the weight or measure, he is not indictable, though the opinion is exaggerated.[1]

§ 444. **Title to Property.** — The false pretence of having title to property, or of its being unincumbered by mortgage, made by one offering it for sale, is within the statute.[2]

Warranty. — Whether, if the purchaser takes a conveyance with covenant of warranty, this does not create a distinction, on the ground that he must be presumed to rely on his covenant, and not on the pretence, is a question. In an English *nisi prius* case, where the main misrepresentation proved was in the deed of conveyance itself, which contained also this covenant, the presiding judge ruled against the prosecution: because, he said, "the doctrine contended for would make every breach of warranty or false assertion at the time of a bargain a transportable offence."[3] But, in Maine, it is held, that if, on an exchange of personal property, one falsely pretends to own unincumbered what he is disposing of, and also warrants it against incumbrances, he is liable to indictment, provided the pretence, and not the warranty, was the inducement to the other to make the exchange.[4] And this is doubtless the true doctrine.[5]

§ 445. **Being unmarried — Right to bring Suit.** — The pretence of being unmarried, and in a condition to contract matrimony, is, we have seen, sufficient.[6] In an English case, a married man

really is, and thereby gets paid for a quantity of coal, over and above the quantity delivered, I am quite satisfied he is indictable."

[1] The reader will see, in the last note, the distinction somewhat differently expressed, and accept for himself the form of expression which he deems the more accurate. See also post, § 453, note, 457.

[2] Ante, § 426; The State *v.* Newell, 1 Misso. 248; Commonwealth *v.* Lincoln, 11 Allen, 233; Reg. *v.* Meakin, 11 Cox C. C. 270. See Reg. *v.* Martin, 1 Fost. & F. 501.

[3] Rex *v.* Codrington, 1 Car. & P. 661, Littledale, J.; the property being a reversionary interest in one-seventh share of a sum of money left by the defendant's grandfather. And see Rex *v.* Pywell, 1 Stark. 402; Reg. *v.* Burgon, Dears. & B. 11, 36 Eng. L. & Eq. 615; The State *v.* Dozier, Dudley, Ga. 155; ante, § 426; The State *v.* Chunn, 19 Misso. 233.

[4] The State *v.* Dorr, 33 Maine, 498. And see Reg. *v.* Adamson, 1 Car. & K. 192, 2 Moody, 286.

[5] See Commonwealth *v.* Lincoln, 11 Allen, 233; ante, § 426.

[6] See ante, § 422.

had paid his addresses to the prosecutrix, and got from her a marriage promise, which she refused to ratify. He then threatened her with an action at law, and obtained from her, in ignorance of the impediment, £100 to forbear. The indictment against him charged the pretences to be, first, that he was unmarried; secondly, that he was entitled to maintain a suit for breach of promise. Lord Denman, C. J., left it for the jury to say, whether the money was in fact obtained by the false pretence of the prisoner that he was single. They found him guilty, and the chief justice conferred with Maule, J., and both were "clearly of opinion, that there was evidence to go to the jury that the money was obtained by the false pretence that the prisoner was a single man, and in a condition to intermarry with the prosecutrix; and Mr. Justice Maule was further of opinion, that there was also evidence of the money having been obtained by the false pretence of the prisoner that he was entitled to maintain an action for breach of promise of marriage, and that such latter false pretence was a sufficient false pretence within the statute." [1]

§ 446. **Bet on Race.** — An early pretence, under Stat. 30 Geo. 2, c. 24, § 1, was of having made a bet on a race to be run the next day (the person of whom the money was obtained was to share the bet); and this was held to be within the statute.[2]

Intrusted with Horses. — So it was held, of pretending to have been intrusted by one to take his horses from Ireland to London, and to have been detained by contrary winds till his money was spent; thereby getting a loan.[3]

Delivered Parcel — The like is held where a carrier, to get the carriage-money, falsely says he has delivered the goods, and lost the receipt for them.[4]

§ 447. *Common Tricks of Trade:* —

General View. — A "common trick of trade" is a thing not easily defined, but a variety of vices have prevailed from the earliest times, often designated by this general term. And defendants have struggled with the courts to induce them to hold, that whatever may be deemed a common trick of trade is not within these false-pretences statutes. Sometimes they have

[1] Reg. *v.* Copeland, Car. & M. 516.

[2] Young *v.* Rex, 3 T. R. 98, 2 East P. C. 828.

[3] Rex *v.* Villeneuve, 2 East P. C. 830.

[4] Rex *v.* Airey, 2 East P. C. 831; Rex *v.* Coleman, 2 East P. C. 672.

overcome the judicial mind on this sort of question; but, in a general way, they have been overborne, and it is substantially settled, that any false representation, extending beyond mere opinion, concerning the quality, value, nature, or other incident of an article offered for sale, whereby a purchaser, relying on the representation, is defrauded, is a violation of these statutes.

§ 448. **Passing Worthless Bank Bill, &c.** — The difficulty lies in the application of this principle. Clearly, the passing for value, of a worthless piece of paper, known to be such, — as, for example, of a bill on a broken bank,[1] or any other specious and valueless bank-bill,[2] even though, according to the majority of the English judges, the bill on its face would be good for nothing if true,[3] — is a sufficient false pretence, being also, we have seen,[4] a false token.

§ 449. **Selling by "Taster."** — A plain case, also, occurred in the purchase of a cheese. Before the prosecutor bought it, the prisoner bored it with an iron scoop, and produced a piece called a "taster," at the end of the scoop, for him to taste. This taster was not in fact taken from the cheese, as it appeared to be, but the prisoner had extracted it from another and superior cheese, and fraudulently inserted it into the top of the scoop. The prosecutor tasted, was satisfied, bought; and the prisoner's conviction was held by the English judges to be right.[5] These facts are even sufficient to constitute a cheat at the common law.[6]

[1] Commonwealth *v.* Stone, 4 Met. 43; Reg. *v.* Dowey, 11 Cox C. C. 115.

[2] Commonwealth *v.* Hulbert, 12 Met. 446, 448. And see ante, § 441 and note.

[3] Rex *v.* Freeth, Russ. & Ry. 127. "Writing." — In New York, under a statute with the clause, "by color of any false token, or *writing*, or by any other false pretence," the court held, that the word "writing" did not include a paper in the form of a bond, neither having nor purporting to have the signature of any person attached to it. "*Writing*, as used in the statute, must mean some *instrument* or at least *letter* — something in writing or purporting to be the act of another, or certainly of some person; but the paper presented in this case does not answer any such description; it was no writing at all, because it did not purport to be the act of any person. Writing, as used in the statute, cannot mean any thing written upon paper, not purporting to be of any force or efficacy; but some instrument in writing, or written paper, purporting to have been signed by some person." And it was observed, that the writing must be false, while there was no falsity about this one; "it was exactly what it purported to be." People *v.* Gates, 13 Wend. 311, opinion by Savage, C. J.

[4] Ante, § 148, 149.

[5] Reg. *v.* Abbott, 1 Den. C. C. 273, 2 Car. & K. 630. In a later case, the prosecutor bought of the prisoner eight

[6] Ante, § 145 et seq.

Sample of Turpentine. — In like manner, a sale of barrels of crude turpentine, under the representation that "they are all right, just as good at bottom as top," when their chief contents are chips, comes even within a statute against cheating by false tokens.[1]

§ 450. **Opinion blending with Fact.** — But when we depart from such cases as these, and come to those in which it is uncertain whether what seems to be fact is not mere opinion, the difficulties of our present inquiry increase. Thus, —

Sheep free from Disease. — In New York, the majority of the court sustained an indictment which alleged, that the defendants falsely represented a drove of sheep, offered by them for sale, to be free from disease and foot-ail, and a lameness apparent in some of them to be owing to accidental injury, which pretences were false, &c.; but Bronson, C. J., dissented, deeming the case to be one simply of representing goods as better than they are.[2]

§ 451. **Identity of Horse.** — In Maine, where the owner of a horse pretended it was a particular one called the Charley, knowing it was not, and thereby effected an exchange of it for other

cheeses, on the latter's representation that certain "tasters" produced had been extracted from these cheeses, while in fact they were, as he knew, from another cheese. And it was held that he was rightly convicted. Wightman, J., observed: "If the prisoner had said, that the cheeses were equal to the tasters produced, that would have fallen within Bryan's Case [see post, § 454–456]; but he said to the prosecutor, 'These tasters are part of the very cheese I propose to sell you;' and therefore it was a representation of a definite fact." Reg. *v.* Goss, Bell C. C. 208, 219, 8 Cox C. C. 262.

[1] The State *v.* Jones, 70 N. C. 75.

[2] People *v.* Crissie, 4 Denio, 525. **Generally of Tricks of Trade.** — Walworth, Ch., sitting in the old "Court of Errors" of this State, once said: "I am aware, from numerous cases which have come under my observation, judicially and otherwise, that the rule of morality, established by the decisions under these statutes [against cheating by false pretences], and by the common law of Scotland, has been deemed too strict for those who, in 1825 and subsequently, have been engaged in defrauding widows and orphans, and the honest and unsuspecting part of the community, by inducing them to invest their little all, which in many instances was their only dependence for the wants and infirmities of age, in the purchase of certain stocks of incorporated companies, which the vendors fraudulently represented as sound and productive, although they at the time knew the institutions to be insolvent, and their stock perfectly worthless. But I am yet to learn, that a law which punishes a man for obtaining the property of his unsuspecting neighbor by means of any wilful misrepresentation, or deliberate falsehood, with intent to defraud him of the same, is establishing a rule of morality which will be deemed too rigid for the respectable merchants and other fair business men of the city of New York, or of any other part of the State." People *v.* Haynes, 14 Wend. 546, 559.

property, the court held this to be a sufficient false pretence, even if the horse were as good and as valuable as the Charley.[1]

§ 452. **Desire to Purchase.** — In a Connecticut case, there was a false pretence in the nature of a conspiracy. By an arrangement between two defendants, who had severally property they wished to sell for more than it was worth, each represented to a different third person that he desired to purchase the other's property, and requested the third person to buy it in his own name, at a sum mentioned, greatly above its value, promising to purchase it of him; but, on its being bought, refused. This was held to be obtaining money by false pretences.[2]

§ 453. **Rule of Morality — (Silver — Horse).** — Two late English cases go far to establish the rule of morality as a part of the law on this subject. In one it appeared, that the prisoner offered a chain in pledge to a pawnbroker, falsely affirming it to be of silver, while in truth he knew it to be, not of silver, but of a metal nearly valueless. And the court held, that this was a sufficient false pretence.[3] In the other case, a false statement concerning the soundness of a horse, which the prisoner sold, was deemed to be sufficient.[4] Still the court clings to the idea, that the statute was not meant to enforce fully the rule of right in dealings of this kind. But where the line is to be drawn which separates what is allowed to the frailty of man from what the statute condemns, we have no means at present of stating with exactness.[5]

§ 454. **Opinion and Fact further distinguished.** — If we look to

[1] The State *v.* Mills, 17 Maine, 211. And see Reg. *v.* Kenrick, 5 Q. B. 49, Dav. & M. 208, 7 Jur. 848.

[2] The State *v.* Rowley, 12 Conn. 101.

[3] Reg. *v.* Roebuck, Dears. & B. 24, 36 Eng. L. & Eq. 631, 7 Cox C. C. 126. The conviction was in fact for an attempt only, because the pawnbroker tested the metal, relying on his test, and not at all on the pretence.

[4] Reg. *v.* Keighley, Dears. & B. 145. Here also was no conviction, because of a formal defect. S. P. The State *v.* Stanley, 64 Maine, 157.

[5] In the case of Reg. *v.* Lee, Leigh & C. 418, 425, already mentioned, ante, § 443, where the false pretence consisted in misrepresenting the weight of the article sold, Pollock, C. B., observed: Overpraise of Article — Trick. — "It has been said that what took place was in the course of a transaction of buying and selling; and, no doubt, where, in the actual course of bargaining, when one man is seeking to exalt, and the other to depreciate the subject-matter of the bargain, the vendor indulges in overpraise of the thing he has to sell, that is not within the statute. Yet, although there may be a real bargain, if some device is used by which the buyer is imposed on, the vendor may be indicted and convicted." And see ante, § 443 and note.

the reason of the law, and especially to its words, we shall see, that its aim is to prevent cheating, and the specific cheat denounced is the one effected by a "false pretence." Now, a mere opinion is not a false pretence; but any statement of a present or past fact is, if false. When two men are negotiating a bargain, they may express opinions about their wares to any extent they will; answering, if they lie about the opinions, only to God, and to the civil department of the law of the country. But when the thing concerns fact, as distinguished from opinion, and a man knowingly misstates the fact, his words in reason amount to a false pretence. Thus, —

Stamp on Wares. — In England, a false representation that a stamp on a watch was the hall mark of the Goldsmiths' Company, and that the number 18 therein meant eighteen-carat gold, referring to the fineness of the case, is held to be an indictable false pretence; nor is it the less so because the watch was further represented to be a gold one, and there was some gold in its composition.[1] In this instance, good morals and sound law happily blend. On the other hand, —

Thickness of Silver Plating — Quality of Foundations. — A man was indicted for obtaining money by the false pretences, that some spoons which he pledged for it as silver-plated had on them as much silver as "Elkington's A," and the foundations were of the best material. Here were two representations, one concerning the quantity of silver which formed the plating, the other concerning the quality of the foundations: both representations were false, known to be so by him who made them. The one, concerning the quantity of silver, was, it is submitted, of a matter of fact; the other, concerning the quality of the foundations, was, it is submitted, of a matter of opinion. On the question whether the pretence was within the statute, the judges differed; the majority held that it was not. They did not put the case in the form here presented, and exactly what was their view the report does not render very plain. The following, from Lord Campbell, C. J., of the majority, not speaking, however, for the rest, conveys a general idea of the reasoning on this side: "With regard to quality, it has been said, that it is lawful to lie. The seller exaggerates, and the buyer depreciates the quality.

[1] Reg. *v.* Suter, 10 Cox C. C. 577 See, and query, Reg. *v.* Lee, 8 Cox C. C. 233

The only specific fact here is, that the spoons were equal to Elkington's A. . . . If you look at what is stated upon the face of the case, it resolves itself into a mere representation of the quality of the article; and, bearing in mind that the article was of the species that it was represented to be to the purchaser, because these were spoons with silver upon them, although not of the same quality as was represented, the pawnbroker received these spoons, and they were valuable, although the quality was not equal to what had been represented. Now it seems to me it never could have been the intention of the legislature to make it an indictable offence for the seller to exaggerate the quality of that which he was selling, any more than it would be an indictable offence for the purchaser, during the bargain, to depreciate the quality of the goods, and to say that they were not equal to that which they really were. Such an extension of the criminal law is most alarming; for, not only would sellers be liable to be indicted for exaggerating the good quality of the goods, but purchasers would be liable to be indicted if they depreciated the quality of the goods, and induced the sellers, by that depreciation, to sell the goods at a lower price than would have been paid for them had it not been for that representation." [1] This reasoning is in itself sound, but not all will deem it to fit the case. The exact words (referring again to the report) are: "that the foundation was of the best material, and that they had *as much silver upon them as Elkington's A.*" As "Elkington's A" was a standard plate, this was an exact statement of the quantity of silver, and it was, within the knowledge of him who made it, false. If this is not a false representation of an existing fact, therefore a false pretence, what is?

§ 455. **Thickness of Silver Plating, continued — Exaggerations.** — This case was observed upon, in a later one in which a sale of cheese by a false taster was held to be within the statute,[2] by Erle, C. J., as follows: "Dissatisfaction has been expressed with that decision as if it must operate as an encouragement to falsehood and fraud; but it should be recollected what an extremely calamitous thing it is for a respectable man to have to stand his trial at a criminal bar upon an indictment brought against him

[1] Reg. *v.* Bryan, Dears. & B. 265, 267, 270, 7 Cox C. C. 312, 40 Eng. L. & Eq. 589 See Reese *v.* Wyman, 9 Ga. 430.

[2] Ante, § 449 and note.

for cheating by a false pretence at the instance of a dissatisfied purchaser. It is easy for an imaginative person to fall into an exaggeration of the praise of the article which he is selling; and, if such statements are indictable, a purchaser who wishes to get out of a bad bargain made by his own negligence might have recourse to an indictment, on the trial of which the vendor's statement on oath would be excluded, instead of being obliged to bring an action where each party would be heard on equal terms. It is of great public importance to endeavor to define the line within which false representations become indictable."[1]

§ 456. **Continued — Fineness of Gold.** — Since the foregoing sections appeared in an earlier edition of this work, a case has passed to judgment in England, by the unanimous opinion of the judges, exactly confirmatory of these views of the author. A man effected the sale of a gold chain by representing that it was 15-carat gold, while in truth it was, as he knew, only a little better than 6-carat. And this was held to be a false pretence within the statute. "How does that differ," asked Bovill, C. J., "from the case of a man who makes a chain of one material and fraudulently represents it to be of another?"[2] The learned judges distinguished this case from the one commented on in the section before the last, on which the defendant relied, by calling attention to the words of the different members of the court uttered in pronouncing their opinions. An expedient like this enables a court to get round a decision which it does not like to take the responsibility of overruling in terms; but, in the actual merits of the two cases, one cannot distinguish between a falsehood as to the thickness of silver plating, and the same as to the quality of gold, except that the former is more certainly within the statute, because the thickness of the silver plating cannot be seen, while the fineness of the gold is in some measure open to inspection by the eye of the purchaser.

§ 457. **Solvent or not.** — In a New Jersey case, a man was induced to part with a claim against a third person at a sacrifice, on the wilfully false representation that this person was insolvent and largely indebted, possessed only of small means, and unable to pay this debt in full. And it was contended for the defendant, that the several questions, whether the person was

[1] Reg. *v.* Goss, Bell C. C. 208, 218, 8 Cox C. C. 262.

[2] Reg. *v.* Ardley, Law Rep. 1 C. C. 301, 305.

solvent or not, largely indebted or not, able to pay in full or not, pertained merely to opinion; but the majority of the court held that they extended to fact, and sustained the indictment.[1] Here, again, sound law and good morals blended.

Effect of combining certain Substances. — So where the representation was, that a certain recipe in writing, combining certain articles, would produce, as a compound, a non-explosive burning fluid and camphene, of great value, this was held to be a representation of a fact, and not of a mere opinion; and, being false, to be a false pretence within the statute.[2]

Value of Watch. — But where the representation was as to the value of a watch left in pawn, this was held to be wholly inadequate,[3] — it was of a mere matter of opinion.

§ 458. *Magnitude of the Pretence:* —

Not Frivolous, &c. — Something has already been mentioned,[4] looking to the proposition that the pretence must not be of too frivolous a nature, or of too small a thing; and, if it is, it will not be sufficient. It is not easy to state the exact limits of this doctrine: it is to be received; yet, cautiously. In a Tennessee case it was held, that, under the particular circumstances disclosed, the obtaining of a quart of whiskey through the false representation of having been sent for it by a third person, was not indictable under the statute.[5]

§ 459. **General Caution.** — The reader should bear in mind, that the foregoing are mere illustrations of false pretences, which may assume numerous other forms in future developments of fraud.

[1] The State *v.* Tomlin, 5 Dutcher, 13.

[2] In re Greenough, 31 Vt. 279.

[3] The State *v.* Estes, 46 Maine, 150.

[4] Ante, § 425, 428, 432, 433. And see Vol. I. § 212 et seq.

[5] Chapman *v.* The State, 2 Head, 36, 42, 43, Caruthers, J., observing: "We are not disposed to open the door so wide, in the construction of this severe and penal act, as to convert every case of falsehood and dishonesty, by which one may get the advantage of another in the most insignificant matter, into a felony. It surely was not intended that barely telling a *lie*, for the purpose of getting twenty-five cents' worth of something to eat or drink, should constitute a felony punishable by at least three years' confinement in the penitentiary. . . . The defendant must be a very degraded creature, but she seems to have been a customer of the prosecutor. The *lie* was not calculated in itself, under the circumstances, to impose upon the prosecutor, and there is some reason to doubt whether it really did so." Consult, in this connection, People *v.* Winslow, 39 Mich. 505; The State *v.* Paul, 69 Maine, 215; The State *v.* McConkey, 49 Iowa, 499; The State *v.* Nichols, 1 Houst. Crim. 114; Reg. *v.* Burgon, Dears. & B. 11, 7 Cox C. C. 131; Rex *v.* Ledbitter, 1 Moody, 76; The State *v.* Stanley, 64 Maine, 157; The State *v.* Munday, 78 N. C. 460; People *v.* Sully, 1 Buf. 17; The State *v.* De Hart, 6 Baxter, 222; Reg. *v.* Foster, 2 Q. B. D. 301, 13 Cox C. C. 393; Reg. *v.* Larner, 14 Cox C. C. 497; Delaney *v.* The State, 7 Baxter, 28; The State *v.* Young, 76 N. C. 258.

III. *What must concur with the False Pretence.*

§ 460. **How far the Cheat must be accomplished.** — Further on we shall advert to attempts.[1] But to constitute the full offence, in the absence of special terms in the statute, the fraud intended must be accomplished.[2] Thus, in England, under 30 Geo. 2, c. 24, the crime was not complete until the money was actually received.[3] But, —

Signature to Instrument. — Under the New York statute against obtaining the signature of any person to a written instrument by false pretences, the full offence is committed when the instrument is signed, and delivered to one who takes it with the intent to cheat or defraud, though no loss or injury has followed.[4] Yet merely subscribing the name is not alone sufficient, though the words are, "obtain the signature of any person to any written instrument." There must be also averred in the indictment, and proved at the trial, "a delivery," — which is necessary to give to the writing its significance and effect.[5]

§ 461. **Pretence the Means of the Cheat.** — A doctrine often adverted to is, that, supposing a person to have been defrauded, yet, if the false pretence did not prevail with him, but something else did, the case is not within the statute.[6] This proposition is plain; but, —

Partly the Pretence. — In the facts of most cases, not one motive alone, but several in combination, induced the defrauded person to part with his goods. And there are various analogies in the criminal law[7] whence the proposition is derivable, that, if the pretence influenced the mind in any degree, though it was but an inferior and minor motive, it is sufficient, however many other motives were impelling it in the same direction. There are perhaps no adjudications which lay down the doctrine quite so broadly; yet all maintain, that the pretence need not have

[1] Post, § 488.

[2] See Stat. Crimes, § 225; Commonwealth *v.* Drew, 19 Pick. 179.

[3] Rex *v.* Buttery, cited in Pearson *v.* McGowran, 5 D. & R. 616, 3 B. & C. 700.

[4] People *v.* Genung, 11 Wend. 18; People *v.* Gates, 13 Wend. 311, 320.

[5] Fenton *v.* People, 4 Hill, N. Y. 126. And see People *v.* Gates, 13 Wend. 311; People *v.* Genung, 11 Wend. 18; People *v.* Galloway, 17 Wend. 540.

[6] Commonwealth *v.* Davidson, 1 Cush. 33; Commonwealth *v.* Drew, 19 Pick. 179; Rex *v.* Dale, 7 Car. & P. 352; People *v.* Herrick, 13 Wend. 87; People *v.* Tompkins, 1 Parker C. C. 224, 238; Clark *v.* People, 2 Lans 329; Vol. I. § 438.

[7] Vol. I. § 264, 339, 815.

been the only inducement; and the proposition is generally stated to be, that it is adequate, if, operating either alone or with other causes, it had a controlling force, if, as some of the cases say, it materially influenced the mind; in other words, if, without the pretence, the defrauded person would not have parted with his goods.[1] This question has already been considered in this chapter in some of its bearings, and to the former discussion the reader is referred.[2]

§ 462. **Pretence must be believed.** — From the foregoing proposition it follows, that the false pretence must be believed by the person to whom it is addressed, else the case is not within the statute.[3] Thus, —

Promise relied on. — In England, a prisoner was charged with obtaining a filly under the false representations, that he was a gentleman's servant, that he lived in Brecon, and that he had bought twenty horses in the Brecon fair. The proof was, that he made these representations, which were false: and also told the prosecutor, that he would meet him in half an hour at Cross Keys, and pay him. And the prosecutor testified, that he parted with his property because he expected the prisoner would do in respect of payment as agreed, and not because he believed the other representations. Whereupon Coleridge, J., ruled, that there must be an acquittal. "The question for you to consider," he said to the jury, "is, whether the prosecutor parted with his filly by reason of his having believed any false pretence made use of by the prisoner."[4]

[1] Commonwealth *v.* Drew, 19 Pick. 179; People *v.* Haynes, 11 Wend. 557, 14 Wend. 546; People *v.* Herrick, 13 Wend. 87, 91; Rex *v.* Witchell, 2 East P. C. 830; Reg. *v.* Eagleton, Dears. 515, 33 Eng. L. & Eq. 540, 24 Law J. N. S. M. C. 158, 1 Jur. N. S. 940; The State *v.* Thatcher, 6 Vroom, 445; Reg. *v.* Lince, 12 Cox C. C. 451, 6 Eng. Rep. 314; Reg. *v.* English, 12 Cox C. C. 171, 2 Eng. Rep. 224. In Commonwealth *v.* Drew, Morton, J., stated the doctrine thus: "That the false pretences, either with or without the co-operation of other causes, had a decisive influence upon the mind of the owner, so that, without their weight, he would not have parted with his property." p. 183. In People *v.* Haynes, Chancellor Walworth said, that, if the pretences "were a part of the moving causes which induced the owner to part with his property, and the defendant would not have obtained the goods if the false pretences had not been superadded to statements which may have been true, or to other circumstances having a partial influence upon the mind of the owner," they will sustain a conviction. p. 555. S. P. The State *v.* Tessier, 32 La. An. 1227.

[2] Ante, § 424–427.

[3] Reg. *v.* Mills, Dears. & B. 205, 7 Cox C. C. 263, 40 Eng. L. & Eq. 562.

[4] Rex *v.* Dale, 7 Car. & P. 352. And see People *v.* Herrick, 13 Wend 87; People *v.* Stetson, 4 Barb. 151.

§ 463. **Plans to entrap.** — How the proposition of the last section affects cases wherein a plan has been laid to entrap a person into the commission of this offence — a question which, in its general bearings, was discussed in the preceding volume [1] — is worthy of consideration. We have not authorities very distinct to this exact point; yet the doctrine has been laid down in general terms, that these plans do not prevent the cheat from being indictable; while still the mind of the person defrauded must, to render the other guilty, have been influenced by the pretence.[2]

§ 464. **Folly of the Person cheated.** — If the prosecutor believed the pretence, and parted with his property relying on it, there is no need he should have acted in the transaction with ordinary care and caution.[3] This seems pretty plainly to be the better doctrine, though cases may be found in the books hardly sustaining it. It rests on the same general principle with an analogous proposition stated under another head, in a previous section.[4] The objection of this want of caution was taken, without avail, in the case where the secretary of an Odd Fellows' lodge told a member he owed more than he did; [5] in that of the defendant pretending to be the payee in a post-office money order, yet signing his real name; [6] and in the case of uttering a counterfeit note, as genuine, though on its face it would have been good for nothing in law if true; Lawrence, J., in the last-mentioned case, dissenting.[7]

§ 465. **Pretence after Property parted with.** — If the fraud is fully effected before the false pretences are made, they cannot be

[1] Vol. I. § 256–263.

[2] Rex *v.* Ady, 7 Car. & P. 140.

[3] Reg. *v.* Woolley, 1 Eng. L. & Eq. 537, 1 Den. C. C. 559, 4 New Sess. Cas. 341, Temp. & M. 279, in which Erle, J., observed: "It was once thought, that the law was only for the protection of the strong and prudent. That notion has ceased to prevail." In a Vermont case, Bennett, J., observed: "It [the statute] was designed to protect the weaker part of mankind; and it has been held to be law at the present day that it is none the less a false pretence although the party imposed upon might, by common prudence, have avoided the imposition. If he was, in fact, imposed upon, it is no good reason for the offender to allege, that, by the use of due diligence or ordinary care, the imposition might have been prevented." In re Greenough, 31 Vt. 279, 290. So, in a civil case, it is no defence, in law, to a party making fraudulent representations upon the sale of property by him, that a by-stander stated the real facts. Haight *v.* Hayt, 19 N. Y. 464.

[4] Ante, § 433–436; and see the cases cited there.

[5] Ante, § 442.

[6] Ante, § 440.

[7] Ante, § 448, the case of Rex *v.* Freeth, Russ. & Ry. 127. See also Reg. *v.* Ball, Car. & M. 249; People *v.* Williams, 4 Hill, N. Y. 9.

deemed the cause of the injury, and the offence is not committed. Therefore, —

Reclaim Goods. — If, after goods are delivered, the vendor becomes suspicious of the solvency of the purchaser, and expresses his intention to reclaim them; whereupon the latter by false pretences induces him to relinquish this purpose, there is no offence against the statute; the sale having been complete before the pretences were made. And though the right of stoppage *in transitu* may remain, the rule appears to be the same, the relinquishment of that right not being deemed a parting with the goods.[1]

Condition subsequent. — But, where the sale is on condition subsequent, and a delivery thereupon, and afterward the vendor is induced by false pretences to give up his property in the goods, this is probably within the statute.[2]

§ 466. **Debt collected by False Pretence.** — It is not punishable within the statute for one to obtain, by a false pretence, payment of a debt already due, because no injury is done.[3] And where the servant of a creditor went to the debtor's wife, and got from her two sacks of malt, saying his master had purchased them of her husband, which was false, it was ruled, by Coleridge, J., on an indictment against the servant, that, if his object was, not to defraud, but merely to enable his master to compel payment of the debt, he must be acquitted.[4]

§ 467. **Money in Charity.** — The New York court took a doubtful step further, and held, that, where money is given in charity to a person soliciting it under a false pretence, the case is not within the statute, though within its words: the ground being, that the statute is for the protection of trade and credit, while begging needs no protection,[5] — a construction aided perhaps by the preamble.[6] The contrary is held in England[7] and Massachu-

[1] People *v.* Haynes, 14 Wend. 546; s. c. in the Supreme Court, 11 Wend. 557.

[2] Ib.

[3] Vol. I. § 438; People *v.* Thomas, 3 Hill, N. Y. 169; Commonwealth *v.* McDuffy, 126 Mass. 467; The State *v.* Hurst, 11 W. Va. 54, 71. And see People *v.* Genung, 11 Wend. 18; People *v.* Getchell, 6 Mich. 496; post, § 471, note.

[4] Rex *v.* Williams, 7 Car. & P. 354.

[5] People *v.* Clough, 17 Wend. 351. It was said also in this case, that begging is a crime by statute; which raises another point. See post, § 468, 469.

[6] Stat. Crimes, § 49–51. See observations of Chapman, C. J., in Commonwealth *v.* Whitcomb, post, at p. 487 of the report; and of Peckham, J., in McCord *v.* People, 46 N. Y. 470, 475, 476.

[7] Reg. *v.* Jones, 1 Eng. L. & Eq. 533 1 Den. C. C. 551, 4 Cox C. C. 198, Temp & M. 270; Reg. *v.* Hensler, 11 Cox C. C. 570.

setts;[1] and, in New York, the legislature interposed, providing, that the statutes shall apply to cases where the thing obtained is "for any alleged charitable or benevolent purpose whatsoever."[2]

§ 468. **Defrauded Person also in the Wrong.** — Another doctrine sustained in New York is, that, where if the false pretences were true the person parting with his goods would be guilty of a crime therein, or where he actually commits an offence in parting with them, the indictment for the cheat cannot be maintained.[3]

§ 469. **Continued.** — On the other hand, the Massachusetts court appears to have directly discarded this doctrine. The point decided was, that a defendant cannot set up, in answer to an indictment of this nature, any wrongful representation of the person injured concerning the goods charged to have been obtained through the false pretence. "Supposing," said Dewey, J., "it should appear that [the individual defrauded] had also violated the statute, that would not justify the defendants. If the other party has also subjected himself to a prosecution for a like offence, he also may be punished. This would be much better than that both should escape punishment because each deserved it equally."[4] And this view accords with the general spirit of the criminal law, wherein the fault of one man is not received in excuse for that of another; while the New York doctrine would introduce a well-known principle of civil jurisprudence into a system of laws to which it is alien.[5]

§ 470. **Previous Confidence.** — In an early English case it was claimed by the defendant, that the statute does not apply where there is a previous confidence between the parties; but the court overruled the point, and considered, that, if the false pretence succeeded, it was enough. Therefore a conviction was held to be right, against a workman, who, in the service of clothiers, was to keep an account of the number of shearsmen employed, with their earnings and wages, deliver it weekly in writing to a clerk, and receive from the clerk the amount due them; the false pretence being, that this account contained charges for more work,

[1] Commonwealth *v.* Whitcomb, 107 Mass. 486.

[2] N. Y. Stat. 1851, c. 144, § 1.

[3] People *v.* Stetson, 4 Barb. 151; McCord *v.* People, 46 N. Y. 470, Peckham, J., dissenting. And see People *v.* Clough, 17 Wend. 351; People *v.* Wilson, 6 Johns. 820; ante, § 467, and compare with ante, § 466.

[4] Commonwealth *v.* Morrill, 8 Cush. 571.

[5] Vol I. § 256, 257, 267, 268.

and of other men, than the facts justified, whereby he got a larger sum than was his right.[1]

§ 471. **The Intent to defraud.** — Again; there must be an intent to defraud,[2] — a proposition which grows out of doctrines discussed in the previous volume,[3] — although the intent may, as in other criminal cases, be inferred from the act.[4] And the false pretences must have been used for the purpose of perpetrating the fraud.[5] Still it has been held in Indiana, and it would seem to be sound general doctrine, that, if the false pretences are employed with the view of obtaining a particular article of value, and not that article but another is parted with, the case is within the statute.[6]

"Knowingly" false — Form of Indictment. — The fraudulent intent implies a knowledge of the falsity of the pretences; consequently an indictment omitting the word "knowingly" is, in England, held to be insufficient, though it pursues the exact words of the statute of 7 & 8 Geo. 4, c. 29, § 53,[7] on which it is drawn,[8] — a defect, however, which was cured after verdict by 7 Geo. 4, c. 64, § 21. This latter statute provides, among other things, that a count shall be sufficient after verdict if it describes the offence in the words of the enactment.[9]

Purpose to pay. — It will not avail the defendant that he meant to pay for the goods when he should be able.[10]

§ 472. **Must all Steps in Offence be against same Person?** — Now,

[1] Rex *v.* Witchell, 2 East P. C. 830.

[2] Commonwealth *v.* Drew, 19 Pick. 179; Reg. *v.* Bloomfield, Car. & M. 537.

[3] Vol. I. § 204 et seq., 285 et seq.

[4] People *v.* Herrick, 13 Wend. 87. And see Vol. I. § 734, 735.

[5] Commonwealth *v.* Drew, 19 Pick. 179; Bowler *v.* The State, 41 Missis. 570; Reg. *v.* Stone, 1 Fost. & F. 311. **Contract.** — In a Michigan case, where the indictment was for obtaining, by a false pretence, a signature indorsing a promissory note, it was offered in defence that the prosecutor was under contract to make the indorsement, therefore, though he was not disposed to fulfil his contract, the defendant could have no intent to defraud him, when, by false means, he sought to obtain what was his due. See ante, § 466. And the court held, that this evidence should have been admitted. Said Martin, C. J.: "A falsehood does not necessarily imply an intent to defraud; for it may be uttered to secure a right, and, however much and severely it may be reprobated in ethics, the law does not assume to punish moral delinquencies as such. To defraud is to deprive another of a right, of property, or of money." People *v.* Getchell, 6 Mich. 496, 504.

[6] Todd *v.* The State, 31 Ind. 514.

[7] Ante, § 412.

[8] Reg. *v.* Henderson, 2 Moody, 192; Reg. *v.* Philpotts, 1 Car. & K. 112.

[9] Reg. *v.* Bowen, 13 Q. B. 790, 13 Jur. 1045. This case even casts a doubt over the previous decisions as to the form of the indictment, though not as to the proof required at the trial.

[10] Reg. *v.* Naylor, Law Rep. 1 C. C. 4

here are three distinct things; namely, the intent to defraud, the false pretence made with the intent, the fraud accomplished. And while they must all concur to constitute a case under the statute, there seems to be no necessity, that, as a universal rule, they should operate severally against the same person.[1] Therefore an indictment has been held good which averred, that the defendant made the false pretences to one, and thereby got his money, with intent to injure another.[2]

Pretence to Bailee. — Without the aid of this doctrine, and on an obvious principle of frequent application in the law of larceny, if, at the trial, the money obtained appears not to have belonged to the prosecutor, but only to have been in his custody as bailee, there may still be a conviction.[3]

Pretence to Agent. — Also under the general law of agency, a false pretence to the agent, especially if communicated to the principal, and acted on by him, is a false pretence to the principal.[4] "It is immaterial whether it passed through a direct or a circuitous channel." [5]

§ 473. **Further as to Pretences by and through Agents.** — From these and other principles of the criminal law,[6] it follows, that the party obtaining the goods or other thing need not be acting on his own account, to make him an offender, neither need he expect to derive pecuniary or other benefit to himself.[7] But there may be an "innocent agent," in this offence the same as any other, — the doctrine of which has already been explained.[8]

[1] In Rex *v.* Lara, 2 Leach, 4th ed. 647, 2 East P. C. 819, 824, 6 T. R. 565, it appears to have been held, that an indictment for a fraud at common law, charging the false pretence to have been made to one person and the deceit to have been practised on another, is bad. Concerning this case, see, in disapproval, Commonwealth *v.* Call, 21 Pick. 515, 520

[2] Commonwealth *v.* Call, 21 Pick. 515 See Reg. *v.* Kealey, 1 Eng. L. & Eq. 585, 2 Den. C. C. 68; Reg. *v.* Tully, 9 Car. & P. 227. **Pretence to Wife.** — Where a forged request for the delivery of goods was addressed to a married woman in her maiden name, it was held that the party uttering it might be convicted on an indictment charging the intent to be to defraud the husband. Rex *v.* Carter, 7 Car. & P. 134. **Delivery by Wife.** — If the wife, by direction of the husband, delivers the property to the person making the false pretence, this is the same as though the delivery were by the husband himself. Reg. *v.* Moseley, Leigh & C. 92, 9 Cox C. C. 16.

[3] Britt *v.* The State, 9 Humph. 31.

[4] And see Crim. Proced. I. § 332.

[5] Commonwealth *v.* Call, 21 Pick. 515; Commonwealth *v.* Harley, 7 Met. 462; Stat. Crimes, § 134. And see Thompson *v.* Rose, 16 Conn. 71.

[6] See Vol. I. § 335, 628-642.

[7] Commonwealth *v.* Harley, 7 Met. 462.

[8] Vol. I. § 310, 651; Reg. *v.* Butcher, Bell C. C. 6, 8 Cox C. C. 77; Reg. *v.* Dowey, 11 Cox C. C. 115.

§ 474. **Continued — Check on Bank — Agent to draw the Money.** — If one makes his check on a bank in which he has no fund, and gets it cashed by a third person, who supposes it to be good, he does not thereby constitute this person his agent to draw the check, so as to become holden for an attempted cheat by a false pretence in the place at which the check is presented for payment. Said Lord Campbell, C. J.: "The act of Parliament contemplates the money being obtained according to the wish and for the advantage, or at all events to gain some object, of the party who makes the false pretence. Here it was not to gain any object, and it was not according to his wish. He would derive no benefit from the check being honored. He had obtained his full object in St. Petersburg [where the check was cashed], and had the money in his pocket, and it would have been for the advantage of the defendant if the draft had been burnt or sent to the bottom of the sea. The statute was intended to meet a failure of justice arising from the distinction between larceny and fraud." And Platt, B., observed: "It cannot be said that a party who presents a check for his own benefit is the agent of another who receives no benefit whatever." [1]

§ 475. **Effect of Consideration paid.** — A defendant once undertook to maintain, that, where a consideration, however inadequate, has actually been paid for the article, an indictment for obtaining it by false pretences will not lie. This proposition was plainly in conflict with the entire current of adjudication on the subject, and with the reason on which the law of false pretences proceeds; because, if the receipt of a part consideration had its influence, still the false pretence had its influence also, and was therefore sufficient; [2] and because so much of the article as was

[1] Reg. *v.* Garrett, Dears. 232, 241, 243, 22 Eng. L. & Eq. 607, 6 Cox C. C. 260, 23 Law J. N. S. M. C. 20, 17 Jur. 1060. The New York commissioners recommend the following to be enacted: "The use of a matured check, or other order for the payment of money, as a means of obtaining any signature, money, or property, &c., by a person who knows that the drawer thereof is not entitled to draw for the sum specified therein, upon the drawee, is the use of a false token, &c., although no representation is made in respect thereto." And they add: "As to the necessity of such a provision, see Allen's Case, 3 City H. Rec. 118; Conger's Case, 4 City H. Rec. 65; 1 Wheeler Crim. Cas. 446; Van Pelt's Case, 1 City H. Rec. 137; People *v.* Tompkins, 1 Parker C. C. 224;" Draft of Penal Code, A. D. 1864, p. 226. Query, however, whether principles already discussed in this chapter do not make such a case indictable without the aid of a special provision. See ante, § 417 and note, 430, 438, 441, 448, 449, 457

[2] Ante, § 427, 461.

not paid for was obtained as distinctly and wholly by the false pretence as the entire article would have been if no consideration whatever had passed. The case was of a sale of bread, and "an attempt," in the language of Parke, B., "to obtain money by the false and fraudulent representation of an antecedent fact; namely, that a greater number of pounds of bread had been delivered than had been actually delivered, and that representation made with a view of obtaining as many sums of 2*d.* as the number of loaves falsely pretended to have been furnished amount to." And the conviction of the defendant for an indictable attempt to cheat was sustained.[1]

IV. *What Property must be obtained.*

§ 476. **Diversities of Statutes.** — Upon this subject, the statutes differ, while none of them are as broad as the common law, explained under the title Cheats.[2] The practitioner is, therefore, cautioned to look carefully at the enactments of his own State as they affect the present question. The meanings of some of the words employed in these statutes are given at length in "Statutory Crimes;" where they may be found by consulting the index.

§ 477. **"Obtain."** — The words of the English statute, 24 & 25 Vict. c. 96, § 88, are, "Whosoever shall, &c., *obtain* from any other person any chattel," &c., and the reader will observe that the same words are employed in the earlier English enactments;[3] they are common, too, in this country. Upon this it is held, that, —

Rule of Larceny — (Use — Ownership). — If the purpose of the wrong-doer was merely to procure the use of the chattel, the case is not within the statute, the same rule applying here as in larceny. Therefore, when one was convicted for getting, by a false pretence, the use of a horse from a livery stable for a day, the conviction was quashed.[4] It appears to be essential also that

[1] Reg. *v.* Eagleton, Dears 515, 33 Eng. L. & Eq. 540. See ante, § 429, 442.

[2] Ante, § 160.

[3] Ante, § 411–413.

[4] Reg. *v.* Kilham, Law Rep. 1 C. C. 261. Said Bovill, C. J., speaking for the whole court: "The word 'obtain,' in this section, does not mean obtain the loan of, but obtain the property in, any chattel, &c. This is, to some extent, indicated by the proviso, that, if it be proved that the person indicted obtained

the owner should have intended to part with his ownership in the property.[1]

§ 478. **Rule of Larceny, continued.** — The North Carolina court, in interpreting the statutes of that State, followed in another respect the rule of larceny. The statutory words were "money, goods, property, or other thing of value," "or any bank-note, check, or order for the payment of money," &c.; and from these, viewed in connection with other provisions, the result was derived, that nothing can be the subject of this offence except what is also the subject of larceny either at the common law or under statutes. Therefore, —

Land. — The false-pretence act was held not to extend to a conveyance of land.[2]

§ 479. **Further Analogy to Larceny — ("Chattel" — Dog).** — And in England the word "chattel," in this act, is held not to include a dog. Said Lord Campbell, C. J.: "There is a specific mitigated punishment in the 7 & 8 Geo. 4, c. 29, § 31, for dog-stealing, but it is not larceny at common law; and, if it is not, I am of

the property in such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted; but it is made more clear by referring to the earlier statute from which the language of § 88 is adopted. 7 & 8 Geo. 4, c. 29, § 53, recites, that 'a failure of justice frequently arises from the subtle distinction between larceny and fraud,' and, for remedy thereof, enacts, that, 'if any person shall, by any false pretence, obtain,' &c. The subtle distinction which the statute was intended to remedy was this: that if a person, by fraud, induced another to part with the possession only of goods and converted them to his own use, this was larceny; while, if he induced another by fraud to part with the property in the goods as well as the possession, this was not larceny. But to constitute an obtaining by false pretences it is equally essential, as in larceny, that there shall be an intention to deprive the owner wholly of his property. And this intention did not exist in the case before us. **Railroad Ticket.** — In support of the conviction, the case of Reg. *v.* Boulton, 1 Den. C. C. 508, 19 Law J. n. s. M. C. 67, was referred to. There the prisoner was indicted for obtaining, by false pretences, a railway ticket with intent to defraud the company. It was held that the prisoner was rightly convicted, though the ticket had to be given up at the end of the journey. The reasons for this decision do not very clearly appear, but it may be distinguished from the present case in this respect: that the prisoner, by using the ticket for the purpose of travelling on the railway, entirely converted it to his own use for the only purpose for which it was capable of being applied. **Distinguished.** — In this case, the prisoner never intended to deprive the prosecutor of the horse or the property in it, or to appropriate it to himself, but only intended to obtain the use of the horse for a limited time." p. 263, 264.

[1] The State *v.* Vickery, 19 Texas, 326.

[2] The State *v.* Burrows, 11 Ire. 477. And see Commonwealth *v.* Woodrun, 4 Pa. Law Jour. Rep. 207; Dord *v.* People, 9 Barb. 671.

opinion that it is not, within this statute, the subject of false pretences. Are we to suppose, that the legislature intended that for obtaining a dog by false pretences a man should be liable to penal servitude; but that if he actually steals a dog, he should only be liable to three months' imprisonment?"[1]

§ 480. **Credit.** — In harmony with the foregoing interpretations it is held, that, if the thing obtained is not money, or other article within the express words of the statute, but merely a credit in account which may bring money, the substantive offence is not committed; though the transaction constitutes a criminal attempt to get, by the false pretence, the money which the credit may ultimately bring.[2]

Indorsement of Payment. — And it is the same where the thing obtained is the indorsement of a payment on a promissory note.[3] But, —

"Valuable Thing." — The words of the New Jersey statute are "money, wares, merchandise, or other valuable thing;" and it is held that to procure one to execute his own note or contract is to obtain of him a "valuable thing" within this provision.[4] Possibly this interpretation does not accord with that in the next section, yet plainly there is a difference between "valuable thing" and "valuable security."

§ 481. **"Valuable Security."** — By the English statute of 7 & 8 Geo. 4, c. 29, § 53, now repealed, the thing obtained must be "any chattel, money, or valuable security."[5] And the judges held, that, —

One's own Acceptance. — It is not within this statute to procure a person to write his own acceptance on a piece of mercantile paper. The thing obtained, said Lord Campbell, C. J., "must, we conceive, have been the property of some one other than the prisoner. Here there is great difficulty in saying, that, as against the prisoner, the prosecutor had any property in the document as a security, or even in the paper on which the acceptance was written. . . . We apprehend, that, to support the indictment,

[1] Reg. *v.* Robinson, 8 Cox C. C. 115, 116, Bell C. C. 34. See Stat. Crimes, § 344.

[2] Reg. *v.* Eagleton, Dears. 515, 33 Eng. L. & Eq. 540.

[3] The State *v.* Moore, 15 Iowa, 412.

[4] The State *v.* Thatcher, 6 Vroom, 445. As to the meaning of the term "valuable thing," see Stat. Crimes, § 346, note, 875.

[5] Ante, § 412.

the document must have been a valuable security while in the hands of the prosecutor. While it was in the hands of the prosecutor, it was of no value to him, nor to any one else, unless to the prisoner. In obtaining it the prisoner was guilty of a gross fraud; but we think not of a fraud contemplated by this act of Parliament." [1] This case has been followed in Canada.[2]

Views of Interpretation. — This sort of nice distinction is not uncommon in the criminal law. And to the writer it seems eminently beneficial when its object is to eject out of a statute something which, though within its words, is not within its spirit. But when a case is quite within the mischief to be remedied, it seems to the writer that no just rules of interpretation can restrict terms to a narrower meaning than is given them by the ordinary understandings of men.[3] And if one persuades another to put his name to a piece of mere paper, valueless before, but rendered a valuable mercantile security by the name, to the ordinary understanding he obtains thereby of the other a "valuable security," — then, as the case is completely within the mischief of the law, why bend the law by interpretation to screen the delinquent? In accord with what would seem to be the spirit of this suggestion, the New York court has held, that —

"Effects" — Indorsement. — Procuring by a false pretence the indorsement of a promissory note — in a case where the party has afterward used the note for his own benefit — is within the words "money, goods, chattels, or other effects." [4]

§ 482. **Loan of Money.** — Where the thing obtained is money, which is converted to the use of the wrong-doer,[5] it is no objection that it was asked and ostensibly received as a mere loan.[6]

§ 483. **Contract.** — Under a statute making the obtaining of "money" or "goods" by false pretences indictable, a contract is no better than a credit; [7] and, obviously, the obtaining of a contract is not sufficient.[8] But, —

Money through Contract. — If a contract is obtained, and then

[1] Reg. *v.* Danger, Dears. & B. 307, 323, 324, 7 Cox C. C. 303. See Stat. Crimes, § 339, note.

[2] Reg. *v.* Brady, 26 U. C. Q. B. 13.

[3] Stat. Crimes, § 204, 212.

[4] People *v.* Stone, 9 Wend. 182, 190.

[5] Ante, § 477.

[6] Rex *v.* Crossley, 2 Moody & R. 17 2 Lowin, 164.

[7] Ante, § 480.

[8] See Stat. Crimes, § 217, 344–346.

the money is paid pursuant to it, there is authority for holding that this is an obtaining of the money.[1] Still, where the party got from his own banker a credit by drawing on a person upon whom he had no right to draw a bill which, therefore, had no chance of being paid, — even though the banker consequently paid money for him to an extent he would not otherwise have done, — this was held by the English judges to be insufficient. "The prisoner could not be said to have obtained any specific sum on the bill, all that was obtained was credit on account."[2] And it has even been held, contrary to the foregoing doctrine, that, if a contract is entered into by reason of false representations, then money or goods are delivered under the contract, "it is," in the language of Hill, J., "too remote to say that" the wrong-doer "obtained the goods or money by the false pretences."[3] And in Canada it has been adjudged, that an indictment for obtaining a given sum by false pretences is not supported by evidence of obtaining a promissory note for that sum, which note was paid before maturity.[4] The question is perhaps a nice one; still, in principle, if, at the time when the money was paid under a contract which the fraud had rendered void, the party paying it remained ignorant of the fraud and under its influence, this should pretty plainly be deemed to be an obtaining of the money by the pretence, to which the fraudulent contract (to be treated as a nullity[5]) would be no impediment. If the fraud had been discovered, and had ceased to influence the mind of the defrauded person when he paid the money, the case would be different.[6]

§ 484. **Signature to Instrument.** — Besides the provision against getting money, goods, chattels, and the like, by false pretences, there is, in many of the States, a clause against so obtaining the signature of a person to any written instrument.[7]

[1] Reg. *v.* Kenrick, 5 Q. B. 49, Dav. & M. 208; Reg. *v.* Abbott, 1 Den. C. C. 273, 2 Car. & K. 630; Reg. *v.* Dark, 1 Den. C. C. 276. And see People *v.* Herrick, 13 Wend. 87; Reg. *v.* Adamson, 1 Car. & K. 192, 2 Moody, 286; Reg. *v.* Eagleton, Dears. 515, 33 Eng. L. & Eq. 540.

[2] Rex *v.* Wavell, 1 Moody, 224.

[3] Reg. *v.* Bryan, 2 Fost. & F. 567, a jury case, the learned judge adding that the point had been decided in Reg. *v.* Gardner, 25 Law Jour. N. S. M. C. 100, and Dears. & B. 40, ante, § 432, and the decision bound him.

[4] Reg. *v.* Brady, 26 U. C. Q. B. 13.

[5] Bishop First Book, § 124, 125.

[6] See, as perhaps having some relation to this question, Reg. *v.* Watson, Dears. & B. 348, 7 Cox C. C. 364. And see post, § 486.

[7] See People *v.* Galloway, 17 Wend

Nature of the Instrument. — In New York it was held, that, to bring a case within the words "obtain the signature of any person to any written instrument," the instrument must be of such a character as may work a prejudice to the property of him who affixes the signature, or of some other person. Therefore, where the defendant had thus got his wife's name to a deed of land, but the deed was not acknowledged by her before an officer qualified to take the acknowledgment; and under other statutes the deed of a married woman is, before acknowledgment, a mere nullity; the court held the offence not committed. "If the defendant," said the judge, "could not have been convicted of forgery, had he affixed the name of his wife to this instrument without her consent, I think he should not have been convicted of the offence of obtaining her signature to the instrument by false pretences." [1]

V. *Remaining and Connected Questions.*

§ 485. **Felony or Misdemeanor.** — The obtaining of property by false pretences, being a statutory offence, and nowhere punishable with death, is, on common-law principles, a misdemeanor, not a felony.[2] But it will undoubtedly be found to be felony under the statutes of many of the States.[3] Thus, in Mississippi, the statute makes it felony where the value exceeds one hundred dollars.[4]

Principal and Accessory. — The practitioner, before proceeding in a case, will see how this is under the statutes of his own State; and will bear in mind the principles, taught in the previous volume,[5] concerning procuring, aiding, abetting, and the like.[6]

540; People *v.* Stone, 9 Wend. 182; People *v.* Genung, 11 Wend. 18; People *v.* Gates, 13 Wend. 311; Fenton *v.* People, 4 Hill, N. Y. 126; Roberts *v.* The State, 2 Head, 501; The State *v.* Layman, 8 Blackf. 330, which see for a construction of the Indiana statute of false pretences; ante, § 457.

[1] People *v.* Galloway, 17 Wend. 540, opinion by Bronson, J. And see People *v.* Gates, 13 Wend. 311. **Indorsement of Note.** — An indorsement of a negotiable promissory note is a signature to a written instrument within the meaning of this statute. People *v.* Chapman, 4 Parker C. C. 56.

[2] Vol. I. § 614 et seq.

[3] Vol. I. § 618, 622.

[4] Bowler *v.* The State, 41 Missis. 570.

[5] See Vol. I. § 646–708.

[6] See Commonwealth *v.* Harley, 7 Met. 462; Commonwealth *v.* Call, 21 Pick. 515; People *v.* Parish, 4 Denio, 153; Reg. *v.* Moland, 2 Moody, 276; Cowen *v.* People, 14 Ill. 348; Long *v.* The State, 1 Swan, Tenn. 287.

§ 486. **Partly in each of two States.** — Where the transaction is partly in one State and partly in another, it has been deemed that the courts of the State in which the thing was transferred to the possession of the wrong-doer may take cognizance of the offence, though the false pretences were uttered in the other State. For the gist of the wrongful thing done was considered to be, not the uttering of the pretences, but the obtaining of the money or goods.[1]

§ 487. **The Punishment.** — This is a matter generally regulated by statutes, and depending on principles sufficiently considered in the preceding volume.[2]

§ 488. **Attempts.** — According to doctrines fully discussed in the preceding volume,[3] an attempt to commit this statutory offence is, though it fail, indictable as a common-law misdemeanor. There seems to be little inducement to prosecute wrong-doers in cases where no harm has actually been accomplished, and so the books contain few instances of indictments for these attempts. Yet the English courts not unfrequently of late have sustained such indictments; and no question can arise concerning the correctness of the proceeding.[4] The act done must be sufficiently near the fraud meant to be accomplished;[5] but the obtaining of a credit has been held to be in close enough proximity to the money it was to bring, to constitute the criminal attempt.[6] If the person to be defrauded does not believe the pretence to be true, still an indictment for the attempt to defraud

[1] Commonwealth *v.* Van Tuyl, 1 Met. Ky. 1, 3. In this case, "the facts proved upon the trial were, that the defendant was in the State of Ohio, and had along with him a negro named John, whom he represented to be a runaway slave belonging to him, that he was trying to take back to a slave State; stating that he was a resident of Tennessee, from which place the slave had some three or four months previously made his escape. That whilst he was in the State of Ohio, he sold and delivered said negro to B. W. Jenkins, at the price of five hundred dollars, which Jenkins was to pay him when they arrived in Kentucky, and the purchaser was to run the risk of taking the slave to that place." When the parties to the transaction arrived in Kentucky, a bill of sale with warranty was executed, and the money paid. But the negro was free, and not a slave, and both he and the defendant resided in the State of New York. The Kentucky court held, that the offence was complete in Kentucky.

[2] Vol. I. § 927 et seq. As to Massachusetts, see Wilde *v.* Commonwealth, 2 Met. 408.

[3] Vol. I. § 723 et seq.

[4] Reg. *v.* Ball, Car. & M. 249; Reg. *v.* Eagleton, Dears. 515, 33 Eng. L. & Eq. 540; Reg. *v.* Roebuck, Dears. & B 24; Reg. *v.* Francis, Law Rep. 2 C. C 128, 12 Cox C. C. 612.

[5] Vol. I. § 759–765.

[6] Reg. *v.* Eagleton, Dears. 515, 33 Eng. L. & Eq. 540. And see ante, § 480.

may be maintained against the wrong-doer.[1] *A fortiori* it is an indictable attempt where the pretences are believed, and the goods laid out, but the cheat is discovered before they are taken away.[2] We have seen,[3] that this doctrine of attempt applies also to cheats at the common law.

[1] Reg. *v.* Hensler, 11 Cox C. C. 570.
[2] Mathews *v.* The State, 33 Texas, 102. And see Reg. *v.* Jarman, 14 Cox C. C. 111.
[3] Ante, § 168.

For FALSE TOKEN, see CHEATS.
FALSE TOLL-DISH, offence of keeping, see Stat. Crimes.
FARO BANK, exhibiting, see Stat. Crimes.
FERRY, see WAY.
FIGHTING, see Vol. I § 535. And see AFFRAY.

CHAPTER XX.

FORCIBLE ENTRY AND DETAINER.[1]

§ 489–491. Introduction.
492–496. The Old English Statutes.
497–503. The Ownership, Estate, or Possession necessary.
504–513. The Act which constitutes the Offence.
514. The Restitution of Possession awarded.
515, 516. Remaining and Connected Questions.

§ 489. **In General.** — Forcible entry and forcible detainer are in substance and in principle but one offence, and are treated of in the books together, as forcible entry and detainer. A general view of this breach of public tranquillity was given in the first volume.[2]

How defined. — A forcible entry is an entry on another's real estate, or in some special circumstances on one's own, of a nature to be the subject of a personal occupation, made with such an array of force as to create terror in those who are present opposing. A forcible detainer is a detaining of the possession of an estate, to which the person has no perfect title, by force of the same kind.

§ 490. **Why Indictable — Possession of Land by Force.** — According to some writers,[3] a man disseised of his lands was at the common law allowed to use any degree of force necessary to gain possession. And this might have been so in civil jurisprudence; because, if a plaintiff were in the wrong in holding possession of lands, he was in no situation to complain of the defendant's wrong in expelling him, where the latter was the true owner.[4] But there is likewise another doctrine of the com-

[1] See also FORCIBLE TRESPASS. For the pleading, practice, and evidence, see Crim. Proced. II. § 369 et seq. See also Stat. Crimes, § 400, 541, 560.

[2] Vol. I. § 536–538.

[3] 1 Hawk. P. C. Curw. ed. p. 495; 4 Bl. Com. 148.

[4] Vol. I. § 256, 267, 268; 1 Gab. Crim. Law, 321; Taunton *v.* Costar, 7 T. R. 431; Turner *v.* Meymott, 1 Bing. 158; Higgins *v.* The State, 7 Ind. 549. And see Hyatt *v.* Wood, 4 Johns. 150.

mon law; namely, that no one has the right to enforce a claim, however just, by the commission of a breach of public order and tranquillity.[1] Consequently it is now established, that forcible entry, and, in some circumstances, forcible detainer, are indictable crimes, without regard to any statute, English or American.[2]

§ 491. **How the Chapter divided.** — But this matter has furnished a considerable field for legislation, both in England and the United States. Let us, therefore, consider, I. The Old English Statutes; II. The Ownership, Estate, or Possession necessary; III. The Act which constitutes the Offence; IV. The Restitution of Possession awarded; V. Remaining and Connected Questions.

I. *The Old English Statutes.*

§ 492. **Stats. 5 Rich. 2 — 2 Edw. 3 — Whether Common Law, &c.** — The earliest of these enactments is 5 Rich. 2, stat. 1, c. 8,[3]

[1] **Landlord ejecting Tenant.** — In a Massachusetts case, where a tenancy at will had been terminated by the tenant's refusing to pay rent, and the landlord's statutory notice to quit, the latter effected a peaceable personal entry into the premises, which was a room in a dwelling-house, the tenant being therein. He then commenced removing door, windows, and the tenant's furniture, when the tenant resisted him, and a scuffle ensued, and the tenant received a blow upon the head with a hatchet held in the hand of the landlord. The landlord was thereupon indicted for assault and battery; and, on the trial, his counsel requested the court to rule, that, if he got into the premises unopposed, he was in the peaceable possession of his own, with the right to remove the tenant's effects; and, if resisted, he might lawfully oppose force with force. But the court refused, yet told the jury, that, the tenancy being at an end, the landlord might resume his possession without legal process if he could do so without a breach of the peace; that his right to take out windows and door, and to remove the tenant's property, depended on the contingency of his being able to do so without opposition or resistance; that, on being resisted, and finding he could not proceed further without a breach of the peace, it became his duty to desist; and he had no right to eject the tenant by force. This ruling was held to be correct. Commonwealth *v.* Haley, 4 Allen, 318. Compare this with Collins *v.* Thomas, 1 Fost. & F. 416. And see Langdon *v.* Potter, 3 Mass. 215; Saunders *v.* Robinson, 5 Met. 343; Commonwealth *v.* Dudley, 10 Mass. 403; The State *v.* McClay, 1 Harring. Del. 520; Evill *v.* Conwell, 2 Blackf. 133; Burt *v.* The State, 2 Tread. 489; Helm *v.* Slader, 1 A. K. Mar. 320; Bartlett *v.* Draper, 23 Misso. 407; Tucker *v* Phillips, 2 Met. Ky. 416; Commonwealth *v.* Kensey, 3 Pa. Law Jour. Rep. 233.

[2] Vol. I. § 536; Commonwealth *v.* Shattuck, 4 Cush. 141; Rex *v.* Bake, 3 Bur. 1731; Henderson *v.* Commonwealth, 8 Grat. 708; The State *v.* Speirin, 1 Brev. 119; Butts *v.* Voorhees, 1 Green, N. J. 13; Rex *v.* Wilson, 8 T. R. 357; 1 Russ. Crimes, 3d Eng. ed. 304; Newton *v.* Harland, 1 Man. & G. 644; The State *v.* Wilson, 3 Misso. 125; The State *v.* Morris, 3 Misso. 127. Query, whether this is an indictable offence in Alabama. Childress *v.* McGehee, Minor, 131, 134.

[3] In preparing the first edition of this volume, I copied this statute from Pulton,

in the following words: "That none from henceforth make any entry into any lands and tenements, but in case where entry is given by the law; and, in such case, not with strong hand nor with multitude of people, but only in peaceable and easy manner. And if any man from henceforth do to the contrary, and thereof be duly convict, he shall be punished by imprisonment of his body, and thereof ransomed at the king's will." This is the entire statute; it creates, if there were doubt before, a misdemeanor. There appears to be no room for question that it is a part of the common law of this country.[1] But the reader observes, that it applies only to forcible entries, not to detainers. Of prior date to this statute is 2 Edw. 3, c. 3, commonly called the Statute of Northampton, spoken of likewise by Hawkins;[2] yet this one has no very close connection with our present subject. It provides: "That no man, great nor small, of what condition soever he be, — except the king's servants in his presence, and his ministers in executing of the king's precepts, or of their office, and such as be in their company assisting them, and also [those of feats of arms of peace] upon a cry made for arms to keep the peace, and the same in such places where such acts happen, — be so hardy to come before the king's justices or other of the king's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armor to the king, and their bodies to prison at the king's pleasure."

§ 493. **Stat. 15 Rich. 2.** — The next English enactment, which it is important to mention here, is 15 Rich. 2, c. 2; namely, "that the ordinances and statutes, made and not repealed, of them that make entries with strong hand into lands and tenements or other possessions whatsoever, and them hold with force, and also of

and cited it as 5 Rich. 2, c. 7; because it there so stands, and I have seen it so elsewhere. The text is now corrected from Ruffhead.

[1] Kilty Report of Statutes, 222; Harding's Case, 1 Greenl. 22. The Pennsylvania judges have omitted it, possibly by accident, as they mention Stat. 15 Rich. 2, c. 2 (see next section), among the acts in force. Report of Judges, 3 Binn. 595, 613, 614. But in Roberts's Digest of British statutes, the reason of the omission is suggested to be, "probably, because the act of 1700 [Pennsylvania] was considered analogous, and as supplying the place of the statute." p. 283, note.

[2] 1 Hawk. P. C. Curw. ed. p. 496, § 5, and p. 488, § 4.

those that make insurrections, or great ridings, riots, routs, or assemblies, in disturbance of the peace or of the common law, or in affray of the people, shall be holden and kept and fully executed; joined to the same, that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of the peace, or to any of them, that the same justices or justice take sufficient power of the county, and go to the place where such force is made; and, if they find any that hold such place forcibly, after such entry made, they shall be taken and put in the next gaol, there to abide convict, by the record of the same justices or justice, until they have made fine and ransom to the king."[1]

Summary Conviction. — The reader perceives, that the chief effect of this enactment is to provide for a summary conviction of offenders by the magistrate on view.

Common Law with us. — It is of a date sufficiently early to be common law with us; it was received in Maryland[2] and Pennsylvania;[3] and, with all the other acts of Parliament on the subject of forcible entry and detainer, was expressly made of force in South Carolina.[4] But unquestionably there are other States into which it has not come, — a matter, however, depending chiefly on questions of local jurisprudence. The process of summary conviction on view is itself unknown in some of the States, probably in most of them.

Others as Common Law in our States. — Whether the enactments mentioned in the succeeding sections under our present subdivision are common law in any particular State, is a question which each practitioner, in the absence of decisions of the courts, will determine for himself.[5] No particular suggestions can aid him, but the general doctrines by which this sort of inquiry is to be answered are stated elsewhere in these volumes, and more at large in the author's "First Book of the Law."[6]

§ 494. **Stat. 8 Hen. 6.** — The next of these statutes is 8 Hen. 6, c. 9, A. D. 1429. It was intended to correct some defects in the last-recited act; "as," says Hawkins, "in not giving any remedy

[1] See, for some expositions of this statute, 1 Hawk. P. C. Curw. ed. p. 497.

[2] Kilty Report of Statutes, 223.

[3] Report of Judges, 3 Binn. 595, 614; Blythe *v.* Wright, 2 Ashm. 428.

[4] The State *v.* Huntington, 3 Brev. 111.

[5] They were all received in Maryland Kilty Rep. Stats. 222, 227, 236.

[6] Bishop First Book, § 43–59.

against those who were guilty of a forcible detainer after a peaceful entry; nor even against those who were guilty of both a forcible entry and a forcible detainer, if they were removed before the coming of a justice of the peace; and in not giving the justices of the peace any power to restore the party injured by such force to his possession."[1] And we may add, that it seems to be the first statutory provision making forcible detainers indictable; though they were doubtless so at the common law. The more important parts of it are the following: "That from henceforth, where any doth make any forcible entry in lands and tenements or other possessions, or them hold forcibly, after complaint thereof made within the same county where such entry is made, to the justices of the peace, or to one of them, by the party grieved, that the justices or justice so warned, within a convenient time shall cause, or one of them shall cause, the said statute (that is, 15 Rich. 2, c. 2) duly to be executed."

§ 495. **Continued.** — And in § 3 this statute of 8 Hen. 6, c. 9, further provides, that the justices or either of them "shall have authority and power to inquire by the people[2] of the same county, as well of them that make such forcible entries in lands and tenements, as of them which the same hold with force." Then follows a provision for the restitution of the premises to the rightful possessor; thus, "And if it be found before any of them, that any doth contrary to this statute, then the said justices or justice shall cause to reseise the lands and tenements so entered or holden as afore, and shall put the party so put out in full possession of the same lands and tenements, so entered or holden as before." There are other minor provisions, not necessary to be copied, but the whole closes in the following words: "§ 7. Provided always, that they which keep their possessions with force, in any lands and tenements, whereof they or their ancestors, or they whose estate they have in such lands and tenements, have continued their possessions in the same by three years or more, be not endamaged by force of this statute."

§ 496. **Stats. 31 Eliz. — 21 Jac. 1.** — The restitution of posses-

[1] 1 Hawk. P. C. Curw. ed. p. 497.

[2] The meaning of which is, that they may proceed by indictment, as in other cases of misdemeanor. That an indictment lies under this statute, see Rex *v.* Williams, 4 Man. & R. 471, 9 B. & C 549; Anonymous, 4 Co. 48 *a*; Anonymous, 2 Dy. 122, pl. 24; Rex *v.* Taylor 7 Mod. 123.

sion was put on a more exact foundation by 31 Eliz. c. 11 (A. D. 1589); declaring, "That no restitution upon any indictment of forcible entry or holding with force be made to any person or persons, if the person or persons so indicted hath had the occupation, or hath been in quiet possession, by the space of three whole years together, next before the day of such indictment so found, and his, her, or their estate or estates therein not ended or determined; which the party indicted shall and may allege for stay of restitution, and restitution to stay until that be tried, if the other will deny or traverse the same. And if the same allegation be tried against the same person or persons so indicted, then the same person or persons so indicted to pay such costs and damages to the other party as shall be assessed by the judges or justices before whom the same shall be tried; the same costs and damages to be recovered and levied as is usual for costs and damages contained in judgments upon other actions."[1] And Stat. 21 Jac. 1, c. 15 (A. D. 1623), removed a doubt by enacting, that the right to give restitution should exist, not only in favor of persons having the fee, &c., but also it should extend "unto tenants for term of years, tenants by copy of court roll, guardians by knight's service, tenants by *elegit*, statute merchant, and staple."[2]

II. *The Ownership, Estate, or Possession necessary.*

§ 497. **Whether Real Estate — (Forcible Trespass).** — The common-law doctrine seems to be, that the kind of property concerning the possession of which the forbidden tumult arises, is immaterial; hence we have the common-law offence of forcible trespass, to be considered in the next chapter. But to call a forcible trespass to personal property a forcible entry would be a misuse of terms, though it would lead to no error in a legal view. Under the statutes, however, — namely, the statutes of England which are common law in the United States, — the property must be real estate.

What Real Estate. — And though nothing in their words excludes the offence from being committed on any kind of real

[1] See 1 Hawk. P. C. Curw. ed. p. 498, § 14.

[2] 1 Hawk. P. C. Curw. ed. p. 499.

property, yet the nature of some kinds prevents it; indeed, it can probably be committed only on such as is capable of manual occupation.

§ 498. **Further of the Sort of Real Property.** — Hawkins says: "It hath been holden for a general rule, that one may be indicted for a forcible entry into any such incorporeal hereditament for which a writ of entry will lie, either by the common law, as for rent, or by statute, as for tithes, &c. But I do not find any good authority that such an indictment will lie for a common or office; but it seems agreed that an indictment for forcible detainer lies against any one, whether he be the terre-tenant or a stranger, who shall forcibly disturb the lawful proprietor in the enjoyment of any of the above-mentioned possessions: as by violently resisting a lord in his distress for a rent, or by menacing a commoner with bodily hurt if he dare put in his beasts into the common, &c. Yet it seems clear, that no one can come within the danger of these statutes, by a violence offered to another in respect of a way, or such like easement, which is no possession. Also it seemeth, that a man cannot be convicted upon a view, by force of 15 Rich. 2, of a forcible detainer of any such tenement wherein he cannot be said to have made a precedent forcible entry, because that statute gives the justices a jurisdiction of no other forcible detainer but what follows a forcible entry."[1]

§ 499. **Dwelling-house — Distinguished from other Realty.** — Therefore the entry need not be into a dwelling-house.[2] Yet there are circumstances in which, if it is, it will be indictable, while the same things done on open ground would not be so;[3] as, for example, if there are persons in the dwelling-house, and they are put in fear.[4]

§ 500. **Tenant in Common.** — A leading principle is, in the language of Lord Kenyon, "that no one shall with force and violence assert his own title."[5] Therefore, though a tenant in common has no right to resist the entry of his co-tenant upon

[1] 1 Hawk. P. C. Curw. ed. p. 502, § 31.

[2] Rex *v.* Nicholls, 2 Keny. 512.

[3] And see Benson *v.* Strode, 2 Show. 150; Harding's Case, 1 Greenl. 22; The State *v.* Tolever, 5 Ire. 452; The State *v.* Caldwell, 2 Jones, N. C. 468; The State *v.* Bordeaux, 2 Jones, N. C. 241; post, § 504. And see ante, § 490, note.

[4] The State *v.* Fort, 4 Dev. & Bat. 192. And see The State *v.* Morgan, Winston, No. 1, 246.

[5] Rex *v.* Wilson, 8 T. R. 357, 361.

the estate,[1] yet the co-tenant may commit the offence of a forcible entry when the tenant does resist.[2]

Wife. — Even the doctrine seems to be, that a wife may be guilty of this offence in respect of premises held by her husband.[3]

§ 501. **Further of the Estate.** — Hence the common-law rule, as unaffected by statutes English or American, is, that an indictment for a forcible entry need not contain any allegation of estate or interest in the premises. The requisite is, that the person claiming possession, whether by right or wrong, should be in actual and peaceable possession.[4] Not even is evidence of title admissible.[5]

Bare Custody. — Yet there must be, by right or wrong, an actual possession[6] in distinction from a bare custody;[7] therefore a man is not indictable for a forcible entry upon premises held merely by his servant.[8]

Under the Old Statutes. — The same rule appears also to apply to indictments under Stat. 5 Rich. 2, stat. 1, c. 8,[9] before recited;[10] while, under 8 Hen. 6, c. 9, the indictment must state, says Chitty, "that the place was the freehold of the party aggrieved;"[11] or state some other interest in the prosecutor.[12] But on principle we may not easily see how, under any of these statutes, the matter can be otherwise than as at the common law, except where the prosecutor proposes to ask for a judgment of restitution. Where he does so propose, clearly the indictment, on authority and perhaps on principle, must set out his title.[13]

[1] Commonwealth *v.* Lakeman, 4 Cush. 597.

[2] Rex *v.* Marrow, Cas. temp. Hardw. 174, Dublin ed. 164.

[3] Rex *v.* Smyth, 1 Moody & R. 155, 5 Car. & P. 201; 1 Russ. Crimes, 3d Eng. ed. 307.

[4] Rex *v.* Wilson, 8 T. R. 357; Beauchamp *v.* Morris, 4 Bibb, 312; The State *v.* Bennett, 4 Dev. & Bat. 43; The State *v.* Speirin, 1 Brev. 119; Commonwealth *v.* Keeper of Prison, 1 Ashm. 140; People *v.* Leonard, 11 Johns. 504; The State *v.* Pollok, 4 Ire. 305; The State *v.* Anders, 8 Ire. 15; Higgins *v.* The State, 7 Ire. 549.

[5] Reg. *v.* Cokely, 13 U. C. Q. B. 521, decided on Rex *v.* Williams, 4 Man. & R. 471.

[6] Pitman *v.* Davis, Hemp. 29; People *v.* Fields, 1 Lans. 222; Gates *v.* Winslow, 1 Wis. 650; McCauley *v.* Weller, 12 Cal. 500; Pogue *v.* McKee, 3 A. K. Mar. 127; Hunt *v.* Wilson, 14 B. Monr. 44; Bennet *v.* Montgomery, 3 Halst. 48; Mairs *v.* Sparks, 2 Southard, 513; Stewart *v.* Wilson, 1 A. K. Mar. 255.

[7] Commonwealth *v.* Keeper of Prison, 1 Ashm. 140.

[8] The State *v.* Curtis, 4 Dev. & Bat. 222.

[9] 3 Chit. Crim. Law, 1136; Harding's Case, 1 Greenl. 22.

[10] Ante, § 492.

[11] 3 Chit. Crim. Law, 1136; Rex *v.* Taylor, 7 Mod. 123.

[12] Rex *v.* Wilson, 8 T. R. 357.

[13] Torrence *v.* Commonwealth, 9 Barr

How adjudged in New Hampshire. — According to a New Hampshire case, a complaint for a forcible entry must allege, that the complainant was seised of the premises, or possessed of them for a term of years. The judge said, that, on the authorities, "any person who is seised of land in fee for life, or possessed thereof for a term of years, and who is with strong hand and armed power turned out of possession, or held out of possession in the same manner, may have this process. It is of no importance whether the seisin be by right or by wrong, or whether the term for years be legal or not. But there is no doubt that the complaint must allege that the complainant was seised or possessed for a term of years." [1]

§ 502. *As to Forcible Detainer:* —

The Doctrine in Brief. — The question of the possession or estate in forcible detainer is more difficult, being less illuminated by authority. On principle, no one should be held for this offence merely because he defends by force a peaceable possession, in defeasible, of any estate to which another has no real claim. And if one through mistake should honestly suppose, as a question of fact, not of law, that he was occupying this position, he would stand on the same ground, according to a doctrine illustrated in the preceding volume,[2] as if the truth were what he believed it to be. And probably the law will be found, on examination, to be exactly as thus stated.[3]

§ 503. **Detainer distinguished from Entry.** — The word "detainer" implies a previous entry of the party detaining, which indeed may have been peaceable; or a right to enter in the person against whom the premises are detained.[4] And Russell defines

184; The State *v.* Bennett, 4 Dev. & Bat. 43; The State *v.* Anders, 8 Ire. 15; Respublica *v.* Campbell, 1 Dall. 354; The State *v.* Butler, Conference, 331; Vanpool *v.* Commonwealth, 1 Harris, Pa. 391; Burd *v.* Commonwealth, 6 S. & R. 252; Respublica *v.* Shryber, 1 Dall. 68. And see Rex *v.* Williams, 9 B. & C. 549; Crim. Proced. II. § 383, 384.

[1] The State *v.* Pearson, 2 N. H. 550, opinion by Richardson, C. J.

[2] Vol. I. § 303. And see other sections in this connection. See Faris *v.* The State, 3 Ohio State, 159.

[3] See also Vol. I. § 536; Harrington *v.* People, 6 Barb. 607; The State *v.* Elliot, 11 N. H. 540.

[4] The words of the Connecticut statute are, "shall make forcible entry, &c., and with strong hand shall detain the same; or, having made a peaceable entry without the consent of the *actual possessor*, shall hold and detain the same with force and strong hand," &c.; and, under this statute, the court has held, that an allegation of actual possession when the defendant entered, is essential in a complaint for a forcible detainer after a peaceable entry. Phelps *v.* Baldwin, 17 Conn. 209.

forcible detainer to be, "where a man, who enters peaceably, afterwards detains his possession by force."[1] And adds: "This doctrine will apply to a lessee, who, after the end of his term, keeps arms in his house to oppose the entry of the lessor, though no one attempt an entry; or to a lessee at will detaining with force after the will is determined;[2] and it will apply in like manner to a detaining with force by a mortgagor after the mortgage is forfeited, or by the feoffee of a disseisor after entry or claim by the disseisee. And a lessee resisting with force a distress for rent, or forestalling or rescuing the distress, will also be guilty of this offence."[3] Plainly, if a man enters by stratagem, and then retains possession by force, he commits a forcible detainer; and it is even laid down, that this will be regarded as a forcible entry.[4] The North Carolina court has held, that forcible detainer is not indictable at the common law where the entry was peaceable and lawful,[5] — a proposition which seems too narrow. We have seen[6] what forcible detainers were excepted out of Stat. 8 Hen. 6, c. 9, confirmed by 31 Eliz. c. 11.[7]

III. *The Act which constitutes the Offence.*

§ 504. **Complications of Doctrine — What Principles.** — On this branch of our subject it is difficult to lay down exact rules. The offence depends on several distinct legal principles, operating not always uniformly. There are, first, the doctrine of breach of the peace in the nature of assault;[8] next the doctrine of breach of the peace by combinations of numbers, the same as in riot;[9] then, the doctrine that people are liable to grow excited over quarrels concerning their own interests, which last is the peculiar one governing this offence, but in actual development is always found more or less connected with the former two. While these three ingredients mix not equally in the cases, they are

[1] 1 Russ. Crimes, 3d Eng. ed. 310. And see ante, § 498.

[2] See Parke, J., in Rex v. Oakley, 4 B. & Ad. 307.

[3] Com. Dig. tit. Forcible Entry, &c. (B) 1.

[4] Burt v. The State, 3 Brev. 413, 2 Tread. 489; post, § 508.

[5] The State v. Godsey, 13 Ire. 348.

[6] Ante, § 495.

[7] Ante, § 496.

[8] See The State v. Batchelder, 5 N. H. 549; Commonwealth v. Taylor, 5 Binn. 277.

[9] See Rex v. Stroude, 2 Show. 149; Rex v. Wyvill, 7 Mod. 286; Henderson v. Commonwealth, 8 Grat. 708; The State v. Wilson, 3 Misso. 125.

also subjected to the action of what may be termed outside influences: as, whether the place be inhabited or not;[1] whether the party acting has a clear and just claim, or one but feignedly so; whether the possession is of long standing and entirely undisturbed, or is recent and not fully acknowledged by the other party. Indeed we should find it impossible to enumerate all the circumstances of this general nature which more or less vary results. Still there are developed in the decisions some principles to which we shall find it not unwise to refer.

§ 505. **Exceed mere Trespass.** — One principle is, that the act must in all cases exceed a mere trespass.[2] Another is, that, of —

Combination of Numbers. — Combined numbers, striking terror, sometimes supply the place of force, and so constitute the offence, though no actual force is employed. Three persons have been held to be sufficient within this rule.[3] Yet, —

One Person. — The offence may be committed by one person only, who, however, must ordinarily use actual force, or some actual threatening demonstration, in distinction from this constructive force.[4]

Creating Apprehension. — The general idea is, that there must be such violence used, or such an array of numbers, or such language employed, as to create, in the minds of the persons opposing, an apprehension either of bodily harm, or of breach of the peace, if they do not yield up the possession or claim of possession.[5] This applies to cases in which there is some person present to resist; for pretty clearly there may be a forcible entry into a dwelling-house, and possibly into other estate, which will be indictable though no such person is present.[6] Yet evidently

[1] See ante, § 499.

[2] Vol. I. § 538; Rex *v.* Smyth, 5 Car. & P. 201, 1 Moody & R. 155; Rex *v.* Bake, 3 Bur. 1731; Reg. *v.* Newlands, 4 Jur. 322; Rex *v.* Deacon, Ryan & Moody N. P. 27; The State *v.* Tolever, 5 Ire. 452; Gray *v.* Finch, 23 Conn. 495; The State *v.* Ross, 4 Jones, N. C. 315; People *v.* Smith, 24 Barb. 16; The State *v.* McClay, 1 Harring. Del. 520; Hopkins *v.* Calloway, 3 Sneed, 11. See Reg. *v.* Dyer, 6 Mod. 96; Olinger *v.* Shepherd, 12 Grat. 462.

[3] Vol. I. § 538; The State *v.* Simpson, 1 Dev. 504; The State *v.* Pollok, 4 Ire. 305; The State *v.* Armfield, 5 Ire. 207.

[4] Burt *v.* The State, 3 Brev. 413; The State *v.* Pollok, 4 Ire. 305; The State *v.* Bordeaux, 2 Jones, N. C. 241; The State *v.* Caldwell, 2 Jones, N. C. 468.

[5] Commonwealth *v.* Shattuck, 4 Cush. 141; The State *v.* Pollok, 4 Ire. 305; Rex *v.* Smyth, 5 Car. & P. 201, 1 Moody & R. 155; Milner *v.* Maclean, 2 Car. & P. 17; The State *v.* Cargill, 2 Brev. 445, Butts *v.* Voorhees, 1 Green, N. J. 13; Commonwealth *v.* Dudley, 10 Mass. 403; Berry *v.* Williams, 1 Zab. 423; Commonwealth *v.* Rees, 2 Brews. 564; The State *v.* Smith, 2 Ire. 127; Cammack *v.* Macy, 3 A. K. Mar. 296.

[6] See post, § 508, 510; ante, § 499.

the doctrines applicable under such circumstances differ considerably from those which govern forcible entries in the face of the occupant.[1]

§ 506. **Old English Books on this Subject.** — The old books contain, on this subject, much that is law in some circumstances, not in others; owing, perhaps, to their authors not having taken into the account all needful distinctions.[2] What is said in those books should not be disregarded; yet, as accepted, it should be adjusted and limited by the proper qualifying principles. Let us, therefore, set down the points collected by Mr. Gabbett,[3] in his own words, attended by his own references to authorities. He says:[4] —

§ 507. **"What Acts of Violence or Terror constitute a Forcible Entry within the Meaning of the Statutes.** — An entry, to be forcible within the meaning of these statutes, must be accompanied with some circumstances of actual violence or terror; and therefore an entry which hath no other force than such as is implied by the law in every trespass whatsoever, is not within these statutes.[5] The entry may be said to be forcible, not only in respect of the violence actually done to the person of a man, as by beating him if he refuse to relinquish his possession, but also in respect of any other violence in the manner of the entry; as by breaking open the doors of a house, whether any person be in it at the same time or not, especially if it be a dwelling-house.[6] And wherever a man, either by his behavior or speech at the time of his entry, gives those who are in possession of the tenement which he claims, just cause to fear that he will do them some bodily hurt, if they will not give way to him, whether he cause such a terror by carrying with him an unusual number of ser-

[1] See The State *v.* Fort, 4 Dev. & Bat. 192; The State *v.* Bennett, 4 Dev. & Bat. 43. Breaking the door of an unoccupied school-house is not indictable in Pennsylvania. Kramer *v.* Lott, 14 Wright, Pa. 495.

[2] Ante, § 504.

[3] Gabbett. — The reason why I quote from this book, here and in one or two other places, is, not that it is of the highest merit, but because its author excels in stating mere points, and nothing else. He collects the old points from the standard books as servilely and almost as accurately as if he were a machine. If he possessed capacity of a higher order, he would not be likely to do this drudgery so well; or, at least, he would not be likely to copy a legal absurdity in precisely the same way as a well-proportioned legal truth. For the present English law of the subject, see 1 Russ. Crimes, 5th ed. by Prentice, 404–417.

[4] 1 Gab. Crim. Law, 324–326.

[5] Lamb. 133, 134; Dalt. c. 125, p. 297; 1 Hawk. c. 28, § 25, p. 500, 501.

[6] 1 Hawk. c. 28, § 26, p. 501.

vants, or by arming himself in such a manner as plainly intimates a design to back his pretensions by force; or by actually threatening to kill, maim, or beat those who shall continue in possession; or by giving out such speeches as plainly imply a purpose of using force against those who shall make any resistance; these are all such circumstances of terror, as that, in respect of them, an entry may be deemed forcible.[1] And the terror may also be excited, and the forcible entry made, by a single person.[2] But it seemeth that no entry shall be adjudged forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage which is not personal.[3] And, notwithstanding some opinions to the contrary,[4] an entry into a house through a window, or by drawing a latch, or opening a door with a key, cannot bring a man within the meaning of these statutes, which speak of entries with strong hand or multitude of people.[5] But though a man enter peaceably, yet if he turn the party out of possession by force, or frighten him out of his possession by threats, it is a forcible entry.[6]

§ 508. "**The Force need not be upon the Land, &c., nor in the very Act of the Entry.** — And it seems that it is neither necessary that the force should be actually done upon the land, &c., or in the very act of the entry; for if one find a man out of his house, and forcibly withhold him from returning to it, though said person take peaceable possession thereof in the party's absence, this would amount to a forcible entry, because the force is used or employed in such case with an immediate intent to make the entry, and to prevent any opposition to it, and cannot therefore be properly separated from such entry; and it is no objection that the violence is not to the house, but to the person only.[7]

§ 509. "**A Claim of the Lands is essential to accompany the Violence or Terror.** — Besides such circumstances of violence or terror as are above mentioned, the entry must also be accompanied with a claim of the lands, &c., so entered upon; for it is obvi-

[1] 1 Hawk. c. 28, § 27.

[2] Lamb. 35; 1 Hawk. c. 28, § 29, p. 502.

[3] Dalt. c. 126, § 4; 1 Hawk. c. 28, § 28, p. 502.

[4] Noy, 156 187.

[5] 3 Bac. Ab. Forcible Entry (B); 1 Hawk. c. 28, § 26, p. 501.

[6] Dalt. c. 126, p. 299; 3 Bac. Ab. Forcible Entry (B).

[7] 1 Hawk. c. 28, § 26, p. 501.

ous, that, if one who pretends a title to lands barely go over them, either with or without a number of attendants, armed or unarmed, in his way to the church or market, or for such like purpose, without doing any act which, expressly or impliedly, amounts to a claim of such lands, he cannot be said to make an entry thereinto within the meaning of these statutes.[1] But no one can be in danger of those statutes by entering with force into a tenement whereof he himself had the sole and lawful possession, both at and before the time of such entry; as by breaking open the door of his own dwelling-house, or of a castle which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it.[2]

§ 510. **"The Person whose Possession is entered upon need not be upon the Lands, &c.** — And it is also to be observed, that, when a claim is made, it is not necessary that the person whose possession is so entered upon shall be upon the lands, &c., at the time; for there may be a forcible entry where any person's wife, children, or servants are upon the lands to preserve the possession; because whatsoever a man does by his agents is his own act; but his cattle being upon the ground do not preserve his possession.[3] But if an actual claim of the lands, &c., be made with any circumstances of force or terror, it will amount to a forcible entry, whether his adversary actually quit his possession or not;[4] and, if a man enters with force to distrain for rent, this is equally a forcible entry; because, though he does not claim the land itself, yet he claims a right and title out of it, which by these statutes he is forbid to exert by force.[5]

§ 511. **"When the Offence shall be deemed joint; when several.** — As to the co-operation which is required to make others *participes criminis*, the law is, that, if several come in company where their entry is not lawful, and all of them, except one, enter in a peaceable manner, and that one, only, use force, it is a forcible entry in them all; and in such case all who accompany him will be guilty of the forcible entry, and be deemed to enter with him, whether they actually come upon the lands or not; but it is otherwise where one of them has a right of entry; for then they

[1] Dalt. c. 126, § 3; 1 Hawk. c. 28, § 20, p. 500.
[2] 1 Hawk. c. 28, § 32, p. 503.
[3] 3 Bac. Ab. Forcible Entry (B).
[4] 1 Hawk. c. 28, § 21, p. 500.
[5] 3 Bac. Ab. Forcible Entry (B).

only come to do a lawful act, and therefore it is the force only of him who used it.[1] And if divers enter by force to the use of another, but without his knowledge or privity, if he afterwards agrees to it, though such subsequent agreement thereto will make him a disseisor, yet he shall not be adjudged to make a forcible entry within these statutes; because he no way concurred in, nor promoted the force.[2]

§ 512. **What constitutes a Forcible Detainer, and who shall be said to be guilty of it.** — The same circumstances of violence or terror, which will make an entry forcible, will make a detainer forcible also. Whoever, therefore, having a defeasible title (as a lessee after his term is expired), keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor, or person claiming a right of entry thereto, if he dare return; or keeps possession of house or land with such circumstances of terror or show of force as are calculated to deter the rightful owner from resuming his possession, shall be adjudged guilty of a forcible detainer, though no attempt be made to re-enter.[3] It seems, however, that a man ought not to be adjudged guilty of this offence, for barely refusing to go out of a house, and continuing therein in despite of another; as if a lessee at will, after the determination of the will, denies possession to the lessor when he demands it, or shuts the door against the lessor when he would enter.[4] But if a man shuts his doors against a justice of peace coming to view the force, and obstinately refuses to let him come in; or if one place men at a distance from the house in order to assault any one who shall attempt to make an entry into it, he shall, in either case, as it seems, be guilty of a forcible detainer.[5] And it is at least equally clear, that, though a man shall have been in possession for a great length of time by a defeasible title, yet, if such wrongful possessor still continue his occupation with force and arms after a claim made by another, who hath a right of entry thereunto, he shall be punishable for a forcible entry and detainer against the purport of these statutes; because all the estate whereof he was

[1] 3 Bac. Ab. Forcible Entry (B).
[2] Cromp. 69; Dalt. 77; 1 Hawk. c. 28, § 24, p. 500.
[3] Cromp. 70 *b*; Lamb. 145; Dalt. c. 126, § 4; Snigge *v.* Shirton, Cro. Jac. 199; 1 Hawk. c. 28, § 30, p. 502.
[4] Ibid.
[5] Ibid.

seised before such claim, was defeated by it; and his continuance in his possession afterwards amounted, in judgment of law, to a new entry or disseisin."[1]

§ 513. **Possession of Main House — Out-buildings.** — The facts of a North Carolina case were, that a person bought a house, and a shed connected with it, put in a tenant, and failed to pay the purchase-money. The owner then sold the premises to another person, who was admitted by the tenant of the first purchaser into the main part of the house. But the first purchaser had himself locked the shed; and so the second, on being admitted, broke it open. Whereupon the court held, that this breaking open of the shed was no forcible entry into it; because the possession, peaceably taken, of the main house, carried with it in law the possession of all the rest, which was parcel thereof, even of the closed shed.[2]

IV. *The Restitution of Possession awarded.*

§ 514. **General View.** — The leading doctrine is, that a complainant is not entitled, as of course, to this judgment of restitution, even though the defendant is convicted. He must show, *prima facie*, a right of possession.[3] In most of our States, there are statutes for gaining possession, by a summary civil process, of premises wrongfully withheld; practically taking the place of this judgment of restitution upon indictment.

[1] Co. Lit. 256, 257; Cromp. 69 *b*; Lamb. 160, 161; Dalt. c. 128, § 2; 1 Hawk. c. 28, § 34, p. 503.

[2] The State *v.* Pridgen, 8 Ire. 84. See O'Brien *v.* Henry, 6 Ala. 787.

[3] See, on this general subject, Anonymous, 2 Dy. 122, pl. 24; Hardesty *v.* Goodenough, 7 Mod. 138; Rex *v.* Burgess, T. Raym. 84; Rex *v.* Marrow, Cas. temp. Hardw. 174, Dublin ed. 164; Rex *v.* Williams, 4 Man. & R. 471, 9 B. & C. 549; Rex *v.* Harris, Carth. 496, 1 Ld. Raym. 440; Rex *v.* Harnisse, Holt, 324; Lovelace's Case, Comb. 260; Anonymous, 6 Mod. 115; St. Leger *v.* Pope, Comb. 327; Anonymous, March 6, pl. 12; Tawney's Case, 2 Ld. Raym. 1009; Rex *v.* Jones, 1 Stra. 474; Matter of Shotwell, 10 Johns. 304; The State *v.* Anders, 8 Ire. 15; The State *v.* Butler, Conference, 331; Vanpool *v.* Commonwealth, 1 Harris, Pa. 391; Reg. *v.* Connor, 2 Rob. Pract. U. C. 139; Rex *v.* Jackson, Draper, 50; ante, § 495, 496, 501. Where a defendant pleaded guilty to an indictment for forcible entry and detainer, and his son-in-law took possession of the premises before the writ of restitution issued, the writ was held to empower the sheriff to turn the latter out. It was held also, that one who takes possession in this way may be indicted therefor, as for a original entry and detainer. The S Bay, 355.

V. *Remaining and Connected Questions.*

§ 515. **Misdemeanor.** — Forcible entry and detainer are common-law misdemeanors, in distinction from felony. The consequences of this doctrine sufficiently appear in the preceding volume.

§ 516. **Civil in Criminal Form — Husband and Wife.** — Under the New Hampshire statute of Feb. 16, 1791, the court held, that, though the process provided is criminal in form, yet it is in some other respects civil; consequently partaking of the double nature of civil proceedings and of criminal. Therefore, where a husband and his wife committed this offence jointly, the two were joined as defendants; but the fine, which was the punishment, was imposed only on the husband.[1]

[1] The State *v.* Harvey, 5 N. H. 65.

CHAPTER XXI.

FORCIBLE TRESPASS.[1]

§ 517. **How defined.** — A forcible trespass is the same act done to personal property which constitutes a forcible entry when committed on real estate.[2] In the first volume, a general view was presented of this offence.[3]

Presence of Injured Person. — A forcible trespass, however the doctrine may be in forcible entries, can be committed only in the actual presence of the person claiming possession of the property which is thus to be wrested away.[4]

Possession, not Title. — Like forcible entry, "the gist of the offence of forcible trespass is a high-handed invasion of the

[1] See FORCIBLE ENTRY AND DETAINER. For the pleading, practice, and evidence, see Crim. Proced. II. § 389 et seq. And see Stat. Crimes, § 541, 560.

[2] Vol. I. § 536. See ante, § 497.

[3] Vol. I. § 536–538.

[4] The State *v.* McDowell, 1 Hawks, 449; The State *v.* Flowers, 1 Car. Law Repos. 97; The State *v.* Simpson, 1 Dev. 504; The State *v.* Mills, 2 Dev. 420; The State *v.* McCauless, 9 Ire. 375. There is a Tennessee case possibly contrary to this proposition. Two men claimed property, each adverse to the other, in a negro slave woman. The claimant not in possession, while riding on horseback along the public way, met this woman; but the report fails to show whether or not the other claimant was present. He compelled her to go with him to his own house; and he was held to be indictable therefor, not on the ground of any indignity or wrong done to the woman, but of forcible trespass to property. And the court considered, that it made no difference whether the negro woman were willing or unwilling to go with this claimant. Said Overton, J. — it was a case before this single judge: "When an individual claims property, to which another has claim also, he is not justifiable in using any kind of force, either actual or implied, to regain property. The law is the arbiter, and recourse must be had to it. If two men are disputing the property of a horse, and he is in the possession of one, being in his use, the other cannot, without violating the order of society, take and carry him away." The State *v.* Thompson, 2 Tenn. 96. In North Carolina, where the doctrine of the text is distinctly held, the following case occurred. Two white men went to the house of a negro, and one of them claimed a cow in the possession of the latter, who also claimed to own it. They declared that they would take it away; the force was overpowering, and the negro was put in fear. He went to a neighbor's to procure evidence of his ownership, returned, and found the two men driving off the cow, and followed them up still persisting in his claim. It was held that they were guilty of a forcible trespass. The State *v.* McAdden, 71 N. C. 207.

actual possession of another, he being present — title is not drawn in question."[1]

§ 518. **Breach of Peace.** — Perhaps the doctrine of forcible trespass rests, more than that of forcible entry, upon the idea of a breach of the peace, or of the tendency of the act to break the peace. Nothing is indictable as such trespass which does not fall fully within this principle.[2]

Mere Trespass — Fraud. — Evidently, therefore, a mere trespass against the effects of another,[3] or a taking by fraud and stratagem,[4] does not constitute this offence. So, also, —

Words. — Mere words, however violent, though accompanied by a carrying away of the property, are not alone adequate.[5] But, when accompanied by violent demonstrations and putting in fear, the combined facts will constitute the offence.[6]

§ 519. **Combinations of Numbers.** — The idea of combinations of numbers, supplying the place of physical force, prevails here the same as in forcible entry and detainer.[7] When, therefore, in the time of slavery, three persons took away a slave from an old and feeble man, in his presence and against his will; and he was restrained from insisting on his rights by a conviction that it would be useless, and by a want of physical power; this offence of forcible trespass was held to be committed. Said Daniel, J.: "If the acts of the defendants, in the taking of the slave, *tended* to a breach of the peace, they were as much guilty of a forcible trespass as if an actual breach of the peace had taken place."[8]

What Demonstration. — In another case it was observed: "There must be a demonstration of force, as with weapons, or a multitude of people, so as to involve a breach of the peace, or directly tend to it, and be calculated to intimidate or put in fear."[9]

§ 520. **Possession maintained by Force.** — The owner of personal property, as of real,[10] has the right to maintain his possession by force.[11]

[1] Pearson, J., in The State *v.* McCauless, 9 Ire. 375, 376. And see The State *v.* Graham, 8 Jones, N. C. 397.

[2] Rex *v.* Gardiner, 1 Russ. Crimes, 3d Eng. ed. 53; The State *v.* Phipps, 10 Ire. 17; The State *v.* Mills, 2 Dev. 420; The State *v.* Flowers, 1 Car. Law Repos. 97.

[3] The State *v.* Watkins, 4 Humph. 256; The State *v.* Farnsworth, 10 Yerg. 261.

[4] The State *v.* Ray, 10 Ire. 39.

[5] The State *v.* Covington, 70 N. C. 71.

[6] The State *v.* Widenhouse, 71 N. C. 279.

[7] Ante, § 505; The State *v.* Simpson, 1 Dev. 504. And see The State *v.* McAdden, 71 N. C. 207, stated ante, § 517, note.

[8] The State *v.* Armfield, 5 Ire. 207.

[9] Pearson, J., in the State *v.* Ray, 10 Ire. 39.

[10] Vol. I. § 536; ante, § 502.

[11] Vol. I. § 536, Commonwealth *v.*

Forcible Detainer. — And it has been laid down that the offence of forcible detainer does not extend to personal property.[1]

§ 520 *a*. **Analogous Statutory Offences.** — In some of our States, there are statutory offences analogous to this common-law one of forcible trespass; as, for example, —

Malicious Trespass. — This is analogous also to malicious mischief, and commonly it extends equally to real estate as to personal.[2] But offences of this sort are for "Statutory Crimes."

Kennard, 8 Pick, 133. And see Faris *v.* The State, 3 Ohio State, 159. On this general subject, see Vol. I. § 838 et seq. Concerning the right to defend one's person and property, see Vol. I. § 836 et seq.

[1] The State *v.* Marsh, 64 N. C. 378.

[2] The State *v.* Merrill, 3 Blackf. 346; Bock *v.* The State, 50 Ind. 281; Dawson *v.* The State, 52 Ind. 478; Lossen *v.* The State, 62 Ind. 437; The State *v.* Sherrill, 81 N. C. 550.

For FORESTALLING, see Vol. I. § 518–529.

CHAPTER XXII.

FORGERY OF WRITINGS WITH ITS KINDRED OFFENCES.[1]

§ 521, 522. Introduction.
523, 524. Definition and General Doctrine.
525–532. The Writing at Common Law.
533–547. Legal Efficacy of the Writing.
548–571. The Writing under Statutes.
572–595. The Act of Forgery.
596–601. The Intent.
602, 603. The Progress toward effecting the Fraud.
604–608. Offences depending on and growing out of Forgery.
609–612. Remaining and Connected Questions.

§ 521. **Nature of Forgery — Species of Cheat.** — Forgery is, as already observed,[2] a common-law offence of the class known as cheats, and it includes both the unsuccessful attempt and the consummated fraud. In other words, when a cheat, attempted or accomplished, assumed a particular form, the common law gave it the name of forgery, and the rank of a separate offence. Also, to this common law, there have been added many statutes. The consequence is, that forgery in the modern law is an offence of a very complicated nature, — much more so than "Cheats at the Common Law," treated of in a previous chapter.

§ 522. **How the Chapter divided.** — We shall consider, I. The Definition and General Doctrine of Forgery; II. The Writing of which, at the Common Law, it may be committed; III. The Legal Efficacy of the Writing; IV. The Writing under Statutes against Forgeries; V. The Act by which Forgery is committed; VI. The Intent; VII. The Progress toward effecting the Fraud; VIII. Offences depending on and growing out of Forgery; IX. Remaining and Connected Questions.

[1] For matter relating to this title, see Vol. I. § 341, 479, 572, 584, 585, 650, 654, 676, 734, 748, 815, 942 and note, 974, 975. See this volume, COUNTERFEITING AND THE LIKE AS TO COIN. For the pleading, practice, and evidence, see Crim. Proced. II. § 398 et seq. And see Stat. Crimes, § 185, 205, note, 206, 306, 325–343, 568.

[2] Vol. I. § 572; ante, § 148, 157, 158.

I. *The Definition and General Doctrine of Forgery.*

§ 523. **How defined.** — Forgery, at the common law, is the false making or materially altering, with intent to defraud, of any writing which, if genuine, might apparently be of legal efficacy, or the foundation of a legal liability.[1] In form thus extended the definition was in the preceding volume given for the sake of clearness; but it may be reduced to the briefer expression. — Forgery is the fraudulent making[2] of a false writing, which, if genuine, would be apparently of some legal efficacy.[3]

§ 524. **Viewed as an Attempt.** — From this definition, and from what has already been observed,[4] we perceive that forgery is an

[1] Vol. I. § 572; The State *v.* Pierce, 8 Iowa, 231, 235; The State *v.* Thompson, 19 Iowa, 299, 303. Adopted, Rembert *v.* The State, 53 Ala. 467, 468.

[2] An altering of an instrument amounting to forgery is, in law, a forging of the instrument altered. See Commonwealth *v.* Woods, 10 Gray, 477; Commonwealth *v.* Butterick, 100 Mass. 12, 18; People *v.* Marion, 29 Mich. 31; post, § 573.

[3] The books abound in definitions of forgery. **English Commissioners.** — The English commissioners proposed: "Forgery consists in the false and fraudulent making of an instrument with intent to prejudice any public or private right." 5th Rep. Crim. Law Com. A. D. 1840, p. 69. And they cite the following definitions, by English authors and judges: —

Blackstone. — "The fraudulent making or alteration of a writing to the prejudice of another man's right." 4 Bl. Com. 247.

Mr. Justice Buller. — "The making a false instrument with intent to deceive." Rex *v.* Coogan, 2 East P. C. 853.

Mr. Baron Eyre. — "A false signature made with intent to deceive." Rex *v.* Taylor, 2 East P. C. 853. "The false making an instrument which purports on the face of it to be good and valid for the purposes for which it was created, with a design to defraud any person or persons." Rex *v.* Jones, 1 Leach, 4th ed. 366, 367.

Mr. Justice Grose. — "The false making a note or other instrument with intent to defraud." Rex *v.* Parkes, 2 Leach, 4th ed. 775, 785.

Sir E. H. East. — "Forgery, at common law, denotes a *false* making (which includes every alteration or addition to a true instrument), a making *malo animo*, of any written instrument for the purpose of fraud and deceit." 2 East P. C. 852.

Lord Coke. — "To forge is metaphorically taken from the smith, who beateth upon his anvil, and forgeth what fashion or shape he will; the offence is called *crimen falsi*, and the offender *falsarius*, and the Latin word to forge is *falsare* or *fabricare*. And this is properly taken when the act is done in the name of another person." 3 Inst. 169. In a late English case we have the following: —

Blackburn, J. — "Forgery is the false making of an instrument purporting to be that which it is not; it is not the making of an instrument which purports to be what it really is, but which contains false statements. Telling a lie does not become a forgery, because it is reduced to writing." In re Windsor, 10 Cox C. C. 118, 123, 6 B. & S. 522.

Shee, J. — "It is the making or altering of a document with intent to defraud or prejudice another so as to make it appear to be a document made by another." Ib. at p. 124 of Cox.

[4] Ante, § 521.

offence involving, to a great extent, the obscure doctrines which were discussed in our first volume under the title "Attempt."[1] Thus, to constitute an attempt, the act done with the criminal intent must have some real or apparent adaptation to accomplish the ulterior mischief;[2] but if the adaptation is apparent it is sufficient, it need not be real.[3] Consequently, —

Legal Efficacy. — A false writing, to be indictable as a forgery, must be such as, in the language of the foregoing definition, "would, if genuine, be apparently of some legal efficacy." If it is not, the making of it cannot be deemed in law an attempt to cheat.

Writing. — That the thing must be a "writing" depends on a mere technical rule of the law, which has thus drawn the boundaries of the crime itself; while yet, in reason, since the transactions of men are made solemn by writing, it is proper the law should render specially odious this sort of attempted cheat.

II. *The Writing of which Forgery at the Common Law may be committed.*

§ 525. **Made with Pen — Printed, &c.** — In reason, whether the writing is made with the pen, with a brush, with printers' type and ink, or with any other instrument, or by any other device, — whether in characters which stand for words or for ideas, in the English language or in any other, — is immaterial, provided the representation to the eye conveys to any mind the substance of what constitutes forgery. The decisions may not have fully covered this ground, but such is the principle involved in them.

Convey Idea. — A single letter, constituting no word, and conveying no idea, is not a writing, — it must be a vehicle of ideas.[4]

§ 526. **Impressions of Seals.** — Hammond puts the question, "whether seals, or rather their impressions, with other similar subjects, are upon a similar footing with writings [here employing the word in its restricted sense];" and adds, "in all probability it will be found that they are, though no positive authority has sanctioned this notion."[5] Indeed, the forging of deeds was always indictable; and, — Was not the impression of the seal

[1] Vol. I. § 723 et seq.
[2] Vol. I. § 738 et seq., 749 et seq.
[3] Vol. I. § 752, 769.
[4] Teal *v.* Felton, 12 How. U. S. 284, 291.
[5] Hammond on Forgery, parl. ed. 7, pl. 18.

the exact thing against which the law, in its earlier periods, was directed?[1]

§ 527. **Printing.** — Printed matter is a writing.[2] Thus, —

Printed Votes. — Printed votes are "written votes," within a provision of the Massachusetts constitution.[3] And, —

Printed Railroad Ticket. — The counterfeiting of a mere printed railroad ticket is forgery at the common law. In broad terms, this offence may be committed as well of an instrument entirely printed or engraved, as of one written partly or fully with the pen.[4]

Foreign Language. — So forgeries in other languages than the English are frequently the subjects of indictment.

§ 528. **Name of Writing — Under Seal or not.** — It is immaterial by what name the writing is known, and whether it is under seal or not, provided it has the other requisites.[5]

§ 529. **Illustrations of Private Writings the Subjects of Forgery.** — Thus, among forgeries tending to defraud individuals,[6] a bond or

[1] And see observations of the English commissioners quoted post, § 530.

[2] Such, also, is the doctrine proposed by the English commissioners. 5th Rep. Eng. Crim. Law Com. A. D. 1840, p. 70; Act of Crimes and Punishments, A. D. 1844, p. 205.

[3] Henshaw *v.* Foster, 9 Pick. 312. This case was as follows: The Constitution of Massachusetts provided, that "every member of the House of Representatives shall be chosen by written votes." The plaintiff, at an election for representatives, tendered a printed vote; and it was refused by the defendants, who were inspectors of the election, on the ground, that, being printed, it was not within the meaning of the constitution, "written." But the court held that it was written, and gave the plaintiff damages against the defendants for its rejection.

[4] Commonwealth *v.* Ray, 3 Gray, 441. **No Part with Pen.** — Dewey, J., observed: "The cases of forgery generally are cases of forged handwriting. The course of business, and the necessities for greater facilities for despatch, have introduced, to some extent, the practice of having contracts and other instruments wholly printed or engraved, even including the name of the party to be bound. . . . It has never been considered any objection to contracts, required by the Statute of Frauds to be in writing, that they were printed." p. 447. In a case before one of the New York judges (Sutherland), it was held, that forgery may be committed of an instrument wholly printed or engraved, by making the impressions from an engraved plate; where no part, either of the original or of the counterfeit, is performed with a pen. This was a case under a statute with the words "instrument or writing;" but the judge appeared to be of the opinion, that the result would be the same at the common law. People *v.* Rhoner, 4 Parker C. C. 166. See also Reg. *v.* Closs, Dears. & B. 460, 7 Cox C. C. 494; Reg. *v.* Smith, Dears. & B. 566, 8 Cox C. C. 32; Wheeler *v.* Lynde, 1 Allen, 402.

[5] 2 East P. C. 852; Pennsylvania *v.* Misner, Addison, 44; Rex *v.* Ward, 2 Ld. Raym. 1461, 2 Stra. 747; Commonwealth *v.* Chandler, Thacher Crim. Cas. 187.

[6] The State *v.* McGardiner, 1 Ire. 27; Commonwealth *v.* Linton, 2 Va. Cas. 476; Reg. *v.* King, 7 Mod. 150.

other deed,[1] a bill of exchange or promissory note,[2] a check,[3] an assignment of a legal claim or a power of attorney to collect it, an indorsement of a promissory note,[4] an indorsement of a payment,[5] a receipt or acquittance,[6] a letter of credit,[7] a transfer of stock,[8] an order for the delivery of money or goods,[9] an acceptance of a bill of exchange [10] or of an order for the delivery of goods,[11] an affidavit in England for the purpose of obtaining money due to an officer's widow from the treasurer of the queen's bounty,[12] a deposition to be used on the trial of a cause in court,[13] a private act of Parliament,[14] a copy of any instrument to be used in evidence in the place of a real or supposed original,[15] a testimonial of character as a school-master [16] or otherwise,[17] a letter of recommendation to the appointment of a police constable,[18] the entries in the journal [19] or the other books of a mercantile house, an entry in a banker's pass-book,[20] the book itself,[21] and many other such things, — are instruments of which the forgery can be committed. Of course, the particular instrument

[1] 1 Hawk. P. C. Curw. ed. p. 263, 265, § 1, 10; Hammond on Forg. parl. ed. p. 13.

[2] Rex *v.* Birkett, Russ. & Ry. 86; Commonwealth *v.* Ward, 2 Mass. 397; Rex *v.* Morton, 2 East P. C. 955; Butler *v.* Commonwealth, 12 S. & R. 237; Hales's Case, 17 Howell St. Tr. 161; Reg. *v.* White, 2 Fost & F. 554.

[3] Crofts *v.* People, 2 Scam. 442; Hendrick *v.* Commonwealth, 5 Leigh, 707.

[4] Rex *v.* Lewis, Foster, 116, 2 East P. C. 957; Powell *v.* Commonwealth, 11 Grat. 822; Poage *v.* The State, 3 Ohio State, 229.

[5] Pennsylvania *v.* Misner, Addison, 44.

[6] Rex *v* Ward, 2 Ld. Raym. 1461, 2 Stra. 747; Snell *v.* The State, 2 Humph. 347; Commonwealth *v.* Ladd, 15 Mass. 526; Rex *v.* Thomas, 2 Leach, 4th ed. 877, 2 East P. C. 934; People *v.* Hoag, 2 Parker C. C. 36.

[7] Ames's Case, 2 Greenl. 365; Rex *v.* Savage, Style, 12. And see Reg. *v.* Yarrington, 1 Salk. 406.

[8] Rex *v.* Gade, 2 Leach, 4th ed. 732, 2 East P. C. 874; Reg. *v.* Hoatson, 2 Car. & K. 777; Reg. *v.* Marcus, 2 Car. & K. 356.

[9] Rex *v.* Ward, 2 East P. C. 861; People *v.* Fitch, 1 Wend. 198; Harris *v.* People, 9 Barb. 664; The State *v* Holly, 2 Bay, 262.

[10] Reg. *v.* Rogers, 8 Car. & P. 629.

[11] Commonwealth *v.* Ayer, 3 Cush. 150.

[12] Rex *v.* O'Brian, 7 Mod. 378.

[13] The State *v.* Kimball, 50 Maine, 409.

[14] Morris's Case, 4 Howell St. Tr. 951.

[15] Upfold *v.* Leit, 5 Esp. 100. And see The State *v.* Smith, 8 Yerg. 150.

[16] Reg. *v.* Sharman, Dears. 285, 24 Eng. L. & Eq. 553, 23 Law J. N. S. M. C. 51, 18 Jur. 157.

[17] Post, § 534, 535, 601; Reg. *v.* Hodgson, Dears. & B. 3, 36 Eng. L. & Eq. 626; Reg. *v.* Wilson, Dears. & B. 558, 8 Cox C. C. 25.

[18] Reg. *v.* Moah, Dears. & B. 550, 7 Cox C. C. 503.

[19] Biles *v.* Commonwealth, 8 Casey, 529. Such entries, when false, are not necessarily forgeries. The doctrine is, simply, that they may be. The particular entries in the State *v.* Young, 46 N. H. 266, were held not to come within the law of forgery. See post, § 586.

[20] Reg. *v.* Smith, Leigh & C. 168.

[21] Reg. *v.* Moody, Leigh & C. 173.

must have an apparent legal validity, and the act must be otherwise such as is pointed out in this chapter.

§ 530. **Continued.** — "The offence," observe the English commissioners, 'extends to every writing used for the purpose of authentication; as in the case of a will, by which a testator signifies his intentions as to the disposition of his property, or of a certificate by which an officer or other authorized person assures others of the truth of any fact, or of a warrant by which a magistrate signifies his authority to arrest an offender.

Seals — Stamps — Other visible Marks. — "The crime is not confined to the falsification of mere writings; it plainly extends to seals, stamps, and all other visible marks of distinction by which the truth of any fact is authenticated, or the quality or genuineness of any article is warranted: and, consequently, where a party may be deceived and defrauded from having been, by false signs, induced to give credit where none was due."[1]

§ 531. **Public Writings.** — If the forging of writings prejudicial to individuals is indictable, *a fortiori* it may be when prejudicial to many individuals, or the public. Indeed this is the kind of common-law forgery mostly spoken of in the older books. Hawkins mentions as —

Examples. — "Falsely and fraudulently making or altering any matter of record,[2] or any other authentic matter of a public nature; as a parish register,"[3] or "a privy seal,[4] or a license from the barons of Exchequer to compound a debt, or a certificate of holy orders, or a protection from a Parliament man."[5] We may add, the entry of a marriage in a register;[6] which, indeed, is substantially one of Hawkins's illustrations. Therefore the counterfeiting or altering of any judicial process is forgery;[7] as, for

[1] 5th Rep. Crim. Law Com. A. D. 1840, p. 65.

[2] "It is forgery to fabricate a judgment or other record." Hammond on Forgery, parl. ed. p. 12. Refers to Garbutt *v.* Bell, 1 Rol. Abr. 65, 76, pl. 1, 3; Rex *v.* Marsh, 3 Mod. 66.

[3] 1 Hawk. P. C. Curw. ed. p. 263, § 1.

[4] "A commission under the privy seal," Hammond on Forgery, parl. ed. p. 13. Refers to Baal *v.* Baggerley, Cro. Car. 326; s. c. nom. Ball *v.* Baggarley, 1 Rol. Abr. 68.

[5] 1 Hawk. P. C. Curw. ed. p. 265, § 8. 9. And see Briton, P. C., by Kel 33.

[6] Hammond on Forgery, parl. ed. p. 15; Dudly's Case, 2 Sid. 71.

[7] 2 East P. C. 868; Rex *v.* Collier, 5 Car. & P. 160; Commonwealth *v.* Mycall, 2 Mass. 136. In a New York case, it was held not to be forgery in an attorney to alter the figures indicating the day appointed for executing a writ of inquiry, served upon him in a replevin suit; his object, as charged in the indictment, being to defraud by making the notice appear to be irregu-

instance, a writ.[1] So forgery may be committed by writing falsely a pretended order, as from a magistrate to a jailer, to discharge a prisoner because of bail having been given.[2]

§ 532. **Compared with Private Forgeries.** — These forgeries prejudicial to the public are less discussed in the modern books than those which are prejudicial merely to individuals. Yet probably the leading doctrines governing the one class are applicable also to the other. A difference, however, will be seen, by and by, in respect of the intent.[3] A particular false writing may be adapted to injure individuals in a special manner, and the public in a general way; and, as such, be indictable on both grounds.

III. *The Legal Efficacy of the Writing.*

§ 533. **Some Legal Efficacy.** — But, to constitute an indictable forgery, it is not alone sufficient that there be a writing, and that the writing be false; it must also be such as, if true, would be of some legal efficacy, real or apparent, since otherwise it has no legal tendency to defraud.[4]

§ 534. **Illustrations.** — The following are some illustrations: —

Certificate to procure Appointment. — Perhaps the English judges went to the verge, yet trod on no doubtful ground, in holding, as they did, that a certificate of service, sobriety, and good conduct at sea — the object of the certificate being to enable the corporation of the Trinity House to examine the person voluntarily applying, and give him, if found worthy, a certificate of nautical skill, and fitness to act as master mariner — was a subject of forgery at the common law.[5] But it is otherwise of a —

lar. "It was urged," said Nelson, C. J., "that the fraudulent intent consisted in a design to have the inquest set aside for irregularity, on the ground that the notice was short. This argument, however, rests upon mere conjecture; for the act charged had no tendency to produce any such result." People *v.* Cady, 6 Hill, N. Y. 490.

[1] Wiltshire *v.* ———, Yelv. 146; Sale *v.* Marsh, Cro. Eliz. 178.

[2] Rex *v.* Harris, 1 Moody, 393, 6 Car. & P. 129; Rex *v.* Fawcett, 2 East P. C. 862. See Rex *v.* Froud, Russ. & Ry. 389, 1 Brod. & B. 300; s. c. nom. Rex *v.* Froude, 3 Moore, 645.

[3] Post, § 596.

[4] 5th Rep. Eng. Crim. Law Com. A. D. 1840, p. 70; Act of Crimes and Punishments, A. D. 1844, p. 205; Vol. I. § 572, where the cases are cited; Clarke *v.* The State, 8 Ohio State, 630; Abbott *v.* Rose, 62 Maine, 194; John *v.* The State, 23 Wis. 504; Howell *v.* The State, 37 Texas, 591; Reed *v.* The State, 28 Ind. 396.

[5] Reg. *v.* Toshack, Temp. & M. 207, 1 Den. C. C. 492. So it was held, one judge doubting, that the false making of a letter of recommendation, with intent fraudulently to obtain a situation as a police constable, is a forgery at

Certificate to obtain Courtesies. — A false writing directed "to any railroad superintendent," stating that "the bearer has been employed," &c., and "any courtesies shown him will be duly appreciated, and reciprocated should opportunity offer," is not indictable as a forgery, being of no legal validity.[1]

§ 535. **Certifying a Note.** — A writing certifying a particular promissory note to be good was held not to be within the Alabama act of 1836, because it expressed a mere opinion; but how this would be at the common law the case does not decide.[2] Plainly, however, the writing is sufficient at common law, if, were it genuine, it would subject the maker to —

Any Liability. — And when the liability would be "either in the form of an action of assumpsit, as a letter of credit to the amount of five hundred dollars; or to an action on the case in the nature of deceit, as a false representation made with intent to defraud," — the tribunal in Maine held it to be adequate. "The forgery of any writing by which a person might be prejudiced was punishable as forgery at common law."[3]

§ 536. **False Label.** — In England, a man named Borwick was in the habit of putting up for the market, enclosed in printed wrappers, two kinds of powders, called respectively "Borwick's Baking Powders" and "Borwick's Egg Powders." Another man printed wrappers of his own, imitating these, and put in them his own powders, which thus he was enabled to sell as Borwick's. He was indicted, and the offence was laid in the indictment as forgery. But the judges considered, that, though he

the common law. Reg. *v.* Moah, Dears. & B. 550, 7 Cox C. C. 503. See ante, § 529.

[1] Waterman *v.* People, 67 Ill. 91.

[2] The State *v.* Givens, 5 Ala. 747. This statute provides, "that, if any person, &c., shall falsely, &c., forge, &c., any letters patent, gift, grant, covenant, bond, writing obligatory, note of any bank of the United States, or of any bank established by law in any one of the said States, or branch of any territory of the United States, or any bill or order, or acceptance of such bill or order, cotton receipt, receipt for the payment of money or other articles of value, promissory note, bill of exchange or acceptances thereof, will, indenture or deed, or any instrument of writing whatever, to secure the payment or delivery of money, or other article of value, or in discharge of any debt or demand, with intention to defraud any person or persons," &c. &c. — an illustration of the evil of employing a needless array of words to express an idea. **Terms of Statutes.** — Specific terms are not always, even in legal writing, such as statutes, better than more comprehensive ones.

[3] Ames's Case, 2 Greenl. 365. See, on these points, Foulkes *v.* Commonwealth, 2 Rob Va. 836, in which the court was divided. And see Jackson *v.* Weisiger, 2 B. Monr. 214; People *v.* Harrison, 8 Barb. 560.

was probably liable to the criminal law in another form of charge, what he did came short of this offence.[1] And plainly — not adverting now to the words employed by the learned judges — the genuine label put by Borwick on his powders could not be deemed a writing of legal validity, however useful it was to him as an advertisement or a trade mark.

§ 537. **Distinction.** — In descending to the more minute consideration of this question of validity, we should carry in our minds the distinction between writings the validity or invalidity of which appears on their face, and those which are on their face uncertain. And, as to the latter, we should remember that extrinsic evidence may be introduced, showing them to be either valid or invalid.

§ 538. First. *Writings valid or invalid on their Face:* —

Invalid on Face. — A writing invalid on its face cannot be the subject of forgery; because it has no legal tendency to effect a fraud.

Contrary to Statutory Form. — But here we must call to mind the distinction,[2] many times adverted to in these volumes, that every man is presumed to know the law, yet not to know the facts. Whether, for instance, a bond or other instrument is valid, is a question of law; if, therefore, a statute authorizes an instrument not known to the common law, and so prescribes its form as to render any other form null, forgery cannot be committed by making a false statutory one in a form not provided for by the statute,[3] even though it is so like the genuine as to deceive most persons.[4] For example, —

Will inadequately witnessed. — It is not indictable to forge a will attested by a less number of witnesses than the law requires.[5] And, —

Bank-note declared Void. — If a statute not only prohibits a particular bank-note, but declares it void, the forging of its similitude is not forgery.[6]

[1] Reg. *v.* Smith, Dears. & B. 566, 8 Cox C. C. 32. See also Reg. *v.* Closs, Dears. & B. 460, 7 Cox C. C. 494.

[2] Vol. I. § 292 et seq.

[3] People *v.* Harrison, 8 Barb. 560; The State *v.* Jones, 1 Bay, 207; The State *v.* Gutridge, 1 Bay, 285; Rex *v.* Rushworth, Russ. & Ry. 317; 2 Russ. Crimes, 3d Eng. ed. 517; 1 Stark. 396; Rex *v.* Burke, Russ. & Ry. 496. And see Reg. *v.* Barber, 1 Car. & K. 434; Commonwealth *v.* Linton, 2 Va. Cas. 476; Crofts *v.* People, 2 Scam. 442.

[4] The State *v.* Gutridge, 1 Bay, 285; Cunningham *v.* People, 4 Hun, 455.

[5] Rex *v.* Wall, 2 East P. C. 953; The State *v.* Smith, 8 Yerg. 150.

[6] Rex *v.* Moffatt, 1 Leach, 4th ed

§ 539. **Forbidding and declaring void distinguished.** — Yet here we should be on our guard. Merely to prohibit the circulation of a particular denomination of bank-note does not render the note null; and, where there is such mere prohibition, the forgery of the prohibited paper is criminal.[1] There are in our statutes other directory provisions concerning the forms of instruments, the non-compliance with which will not cause the instrument to be invalid; and, in such a case, though the instrument is not in the exact form prescribed, it may be the subject of forgery.[2]

Charter of Bank expired. — Of course, the offence is committed by counterfeiting the bills of a bank whose charter is expired.[3]

§ 540. **Unstamped Instruments.** — Moreover, the English courts, considering the stamp-acts to be mere revenue laws, hold the forging of promissory notes on unstamped paper to be indictable.[4] The like doctrine prevails in this country as to instruments requiring stamps under the United States laws; a forgery, which has no stamp attached, is equally indictable with one which is duly stamped; or, if it is stamped, the indictment is sufficient, and there is no variance, though it does not set out the stamp, — propositions which are reasonably well settled, though a case or two may be found in conflict with them.[5]

431; s. c. nom. Moffat's Case, 2 East P. C. 954. And see Rex *v.* Catapodi, Russ. & Ry. 65; People *v.* Wilson, 6 Johns. 320.

[1] Butler *v.* Commonwealth, 12 S. & R. 237; Thompson *v.* The State, 9 Ohio State, 354; The State *v.* Van Hart, 2 Harrison, 327, the statute, however, providing that the validity of the prohibited bills should not be affected by the prohibitory clause; Van Horne *v.* The State, 5 Pike, 349. Rex *v.* Humphrey, 1 Root, 53, seems the other way. And see Twitchell *v.* Commonwealth, 9 Barr, 211; Rex *v.* Burke, Russ. & Ry. 496; Hendrick *v.* Commonwealth, 5 Leigh, 707; Rex *v.* Chisholm, Russ. & Ry. 297. The Illinois court held, that a conviction cannot be sustained under an indictment, which charges the uttering of a bill of a bank of some other State, of a less denomination than five dollars, with intent to defraud an individual; it being a penal offence to pass or to receive such bills. Gutchins *v.* People, 21 Ill. 642.

[2] Vol. I. § 303; Rex *v.* Randall, Russ. & Ry. 195; Rex *v.* Lyon, Russ. & Ry 255; Rex *v.* Richards, Russ. & Ry. 193; Rex *v.* McIntosh, 2 East P. C. 942, 956; s. c. nom. Rex *v.* Mackintosh, 2 Leach, 4th ed. 883; Reg. *v.* McConnell, 1 Car. & K. 371, 2 Moody, 298.

[3] Buckland *v.* Commonwealth, 8 Leigh, 732; White *v.* Commonwealth, 4 Binn. 418.

[4] Rex *v.* Morton, 2 East P. C. 955, 1 Leach, 4th ed. 258, note; Rex *v.* Hawkeswood, 2 T. R. 606, note, 2 East P. C. 955, 1 Leach, 4th ed. 257; Rex *v.* Reculist, 2 Leach, 4th ed. 703, 2 East P. C. 956; Reg. *v.* Pike, 2 Moody, 70; Rex *v.* Teague, Russ. & Ry. 33, 2 East P. C. 979.

[5] Crim. Proced. II. § 409; Cross *v.* People, 47 Ill. 152; The State *v.* Haynes, 6 Coldw. 550; People *v.* Frank, 28 Cal. 507; Carpenter *v.* Snelling, 97 Mass. 452; Weltner *v.* Riggs, 3 W. Va. 445; Govern *v.* Littlefield, 13 Allen, 127; Tobey *v.* Chipman, 13 Allen, 123; Dudley *v.* Wells, 55 Maine, 145; Hunter *v.*

§ 541. **Good on Face, but invalid in Fact.** — Since men are not legally presumed to know facts, a false instrument which is good on its face may be legally capable of effecting a fraud, though inquiry into extrinsic facts should show it to be invalid even if it were genuine: therefore the forging of such an invalid instrument is a crime.[1] Thus, —

By Unauthorized Person. — If an order of a board of guardians of a poor-law union must be signed, to be binding, by its chairman, still a prisoner charged with forging such an order cannot defend himself by showing that the person purporting, on the face of it, to sign as chairman, was not such.[2] So a defendant was rightly convicted for counterfeiting a protection, though in the name of one who, not being a Parliament man, could not grant it.[3] And, —

Paid Bill or Note. — Though a promissory note or bill of exchange, after being paid, is *functus officio* and no note or bill, yet, if this does not appear on its face, a forgery may be committed by altering it.[4] Likewise, —

Cobb, 1 Bush, 239; The State *v.* Young, 47 N. H. 402. Contra, John *v.* The State, 23 Wis. 504. The State *v.* Mott, 16 Minn. 472. **Further as to the Reasoning.** — It is perceived that these are all cases before the State courts. They contain many reasons, of which some are of such a nature that any one of them is alone sufficient, rendering the better doctrine of the text clear and conclusive. When the case is in the United States' courts, the reasons for this conclusion are not so strong; yet, I submit, they are even then adequate. For example, in the above case of The State *v.* Young, Smith, J., observes: "The order, although unstamped, might, if genuine, be 'apparently of some legal efficacy' (see 2 Bishop Crim. Law, 3d ed. § 495), since any holder of it might, on application to the collector, be permitted to affix the proper stamp, upon payment of the penalty, or without any penalty if the omission appeared to have been 'by reason of accident, mistake, inadvertence, or urgent necessity, and without any wilful design to defraud the United States.' See U. S. Laws, Stat. July 13, 1866, § 9." Again, in the State courts, the omission of a revenue stamp is no defence to an action upon the instrument. Duffy *v.* Hobson, 40 Cal. 240 (overruling Hallock *v.* Jaudin, 34 Cal. 167). And see Frink *v.* Thompson, 4 Lans. 489; Janvrin *v.* Fogg, 49 N. H. 340; Rheinstrom *v.* Cone, 26 Wis. 163; Brown *v.* Thompson, 59 Maine, 372; Morris *v.* McMorris, 44 Missis. 441. It is so of deeds of lands. Congress, having no power to regulate conveyances in the States, cannot render the deed void for the want of a revenue stamp. Moore *v.* Moore, 47 N. Y. 467. To the like effect is Moore *v.* Quirk, 105 Mass. 49.

[1] "There is a distinction between the case of an instrument apparently void, and one where the invalidity is to be made out by the proof of some extrinsic fact. In the former case, the party who makes the instrument cannot, in general, be convicted of forgery, but in the latter he may." People *v.* Galloway, 17 Wend. 540, 542.

[2] Reg. *v.* Pike, 2 Moody, 70, 3 Jur. 27.

[3] Rex *v.* Deakins, 1 Sid. 142.

[4] Rex *v.* Teague, Russ. & Ry. 33, 2 East P. C. 979. I think I am justified

No such Denomination. — It is no defence to a charge of forging bank-bills, that the bank never issued bills of the particular denomination forged.[1]

No Legal Capacity. — Though the person whose name is forged had no legal capacity to make the instrument, this is not a defence.[2]

§ 542. **Drawer altering own Order.** — The following New York case might seem to the casual reader to hold a doctrine different from the foregoing, but it does not. One made his order on a third person for a cow. This third person took the order and delivered the cow, without writing any acceptance. Subsequently, on a settlement, the drawer received back his order from the third person; and afterward, to aid himself in a fraud, altered its date, and undertook to use it in a court of justice. This was held not to be forgery; for the alteration was at most only drawing a new order, since it bore no name but the defendant's.[3]

§ 543. **Fictitious Name — Deceased Person.** — From the foregoing doctrines it follows, that, if the person whose instrument the forgery purports to be is dead,[4] or if he is a mere fictitious person,[5] still, as the question of the existence of such a person is one of fact, not of law, and the instrument appears valid on its face, the offence is complete. But, there is a distinction to be noted as to the —

Form of the Indictment. — The common form of the indictment for forgery sets out an intent to defraud a particular person, and

in citing this case to the very obvious point mentioned in the text; though it seems, from the report, to have turned on those considerations of the stamp laws stated ante, § 540. See Brittain *v.* Bank of London, 3 Fost. & F. 465. And see post, § 542.

[1] The State *v.* Fitzsimmons, 30 Misso. 236. By the Tennessee Act 1851–2, c. 113, § 3, banks organized under its provisions were empowered to issue notes of the denominations allowed to the incorporated banks of the State. Therefore, if one is indicted for having in possession a counterfeit on one of these banks, it is no defence that it is of a denomination different from any actually issued by the bank, which had thus the power to issue it. Trice *v.* The State, 2 Head, 591.

[2] People *v.* Krummer, 4 Parker C. C. 217.

[3] People *v.* Fitch, 1 Wend. 198. And see The State *v.* Greenlee, 1 Dev. 523; post, § 584–586.

[4] Henderson *v.* The State, 14 Texas, 503.

[5] Vol. I. § 572, where the authorities are cited. And see The State *v.* Hayden, 15 N. H. 355; Sasser *v.* The State, 13 Ohio, 453; Commonwealth *v.* Baldwin, 11 Gray, 197. **Cheat.** — So obtaining goods by means of such a forgery is also a cheat at the common law. Commonwealth *v.* Speer, 2 Va. Cas. 65; The State *v.* Patillo, 4 Hawks, 348; ante, § 148.

this intent must always be proved as laid.[1] And if, for any reason, the person could not, as the case appears in proof, be defrauded by the writing, the defendant is to be acquitted.[2] Now it is very common in practice for the indictment to allege, that the intent was to defraud the person or corporation whose name was forged;[3] but this is not necessary, for an allegation of a forgery, for instance, of the bill of an incorporated bank, with the intent to defraud an individual, is sufficient.[4] Yet if the allegation is of an intent to defraud the corporation, and no such corporation exists; or an individual, and no such individual exists; the defendant cannot be convicted on the particular indictment, though he could have been on one differently drawn.[5]

Non-existing Corporation. — That a non-existing corporation must generally be regarded, for the purpose of this distinction and of the general doctrine of this section, the same as a non-existing individual, is evident; because, whether the legislative act of incorporation be deemed a public or private one,[6] the organization and existence of the persons made a body corporate under it, is as much a question of fact as the birth of an individual person. Perhaps a different consideration may apply to corporations of the nature of counties and towns.

§ 544. **The Doctrine restated.** — Therefore the general doctrine is, that the invalidity of an instrument must appear on its face, if the defendant would avail himself of this defect on a charge of forgery.[7] In still other words, the forged instrument, to be the foundation for an indictment, must appear on its face to be

[1] 1 Stark. Crim. Pl. 2d ed. 112, 180, Am. ed. 122, 200; 3 Chit. Crim. Law, 1042; The State *v.* Odel, 3 Brev. 552; West *v.* The State, 2 Zab. 212. See post, § 598, 599.

[2] Reg. *v.* Marcus, 2 Car. & K. 356. In Reg. *v.* Tylney, 1 Den. C. C. 319, 18 Law J. N. S. M. C. 36, the judges would seem to have been divided on this question.

[3] See Brown *v.* Commonwealth, 2 Leigh, 769.

[4] Commonwealth *v.* Carey, 2 Pick. 47; United States *v.* Shellmire, Bald. 370. See Hooper *v.* The State, 8 Humph. 93; Hess *v.* The State, 5 Ohio, 5; People *v.* Rynders, 12 Wend. 425; West *v.* The State, 2 Zab. 212. And see Reg. *v.* Hoatson, 2 Car. & K. 777; Reg. *v.* Carter, 1 Den. C. C. 65.

[5] The State *v.* Givens, 5 Ala. 747; People *v.* Peabody, 25 Wend. 472; People *v.* Davis, 21 Wend. 309; De Bow *v.* People, 1 Denio, 9; Commonwealth *v.* Carey, 2 Pick. 47. See The State *v.* Dourdon, 2 Dev. 443; Commonwealth *v.* Morse, 2 Mass. 128.

[6] See Portsmouth Livery Company *v.* Watson, 10 Mass. 91.

[7] Rex *v.* McIntosh, 2 East P. C. 942; S. C. nom. Rex *v.* Mackintosh, 2 Leach, 4th ed. 883; The State *v.* Pierce, 8 Iowa, 231. And see Rex *v.* Fawcett, 2 East P. C. 862; Rex *v.* Catapodi, Russ. & Ry. 65; Rex *v.* Gade, 2 Leach, 4th ed. 732, 2 East P. C. 874; Reg. *v.* Barber, 1 Car. &

good and valid for the purpose for which it was created.[1] In another aspect, —

Evidence of Fact. — The instrument must be such that, if it were genuine, it would be evidence of the fact it sets out. In illustration of this, the Tennessee court, during slavery, held it to be no forgery in law to give to a slave, with the intent of helping him to freedom, a false paper purporting to be a certificate of another that he was born free.[2]

§ 545. *Writings the Validity of which is uncertain on their Face:* —

Shown to be Forgeries by Extrinsic Facts. — If a writing is so incomplete in form as to leave an apparent uncertainty, in law, whether it is valid or not, a simple charge of forging it fraudulently, &c., does not show an offence; but the indictment must set out such extrinsic facts as will enable the court to see, that, if it were genuine, it would be valid. When such extrinsic circumstances are set out, and also proved at the trial, the defendant may be convicted; while, without them, he must be discharged.[3] Thus, —

§ 546. **Naked Promise.** — It is familiar doctrine that a mere naked promise, no consideration appearing, creates no legal liability. Therefore, —

To pay in Labor. — The New York court held, that such a promise to pay a sum of money in labor is not a writing which shows a legal validity without this extrinsic averment and proof.[4]

Railroad Ticket. — The same was held in Massachusetts concerning a forged railroad ticket, in these words: —

"New York Central Railroad.
Albany to Buffalo.
Good this day only, unless indorsed by the conductor.
D. L. FREMYRE."[5]

Order. — In a Tennessee case the instrument alleged to be forged was as follows: "Mr. Bostick, You will please to charge

K. 434; Reg. *v.* Hoatson, 2 Car & K. 777; Reg. *v.* Pike, 2 Moody, 70.

[1] Rex *v.* Jones, 2 East P. C. 991; People *v.* Harrison, 8 Barb. 560.

[2] The State *v.* Smith, 8 Yerg. 150. And see Upfold *v.* Leit, 5 Esp. 100.

[3] People *v.* Harrison, 8 Barb. 560; People *v.* Shall, 9 Cow. 778; Commonwealth *v.* Ray, 3 Gray, 441. And see Butler *v.* The State, 22 Ala. 43.

[4] People *v.* Shall, 9 Cow. 778.

[5] Commonwealth *v.* Ray, 3 Gray, 441

Mr. J. S. Humphreys' account to us up to this date. Feb. 7, 1849. Twyman and Tannehill;" and the court adjudged the indictment insufficient, because it did not aver — what must therefore have been also proved on the trial — that Humphreys was indebted to Bostick. "It could not be of any benefit to the defendant, or prejudice to the other parties, unless the defendant were indebted at the time to Bostick; and it could have no other effect, if genuine, but to discharge that indebtedness."[1]

Receipt. — On the other hand, a receipt, as for money paid, was held not to be such an instrument that an indebtedness from the person to whom it purports to be given, to the apparent maker of it, need be shown; because, if in fact there were no such indebtedness, still the party giving it "would be liable to an action for the money acknowledged to have been received."[2]

§ 547. **Fictitious Name in these Cases.** — In these cases, wherein we look outside of the writing to determine the question of its validity, it has probably not been decided whether the doctrine applies that the forgery of a fictitious name, the same as of a real one, is indictable.[3] In many, perhaps most, instances of this sort, this legal query would not arise in the facts as disclosed to the court; because these necessary extrinsic facts often depend, for their existence, on the existence of the person or corporation whose name is forged, and if there were no such person or corporation there could be no such facts, and no indictment would be attempted. And there may be a difficulty in laying down a general rule on the question, in advance of the decisions. Still, if the inquiry into the extrinsic facts does not lead directly to the fact of the existence or non-existence of the person or corporation, no obvious reason appears why such existence becomes essential, in this class of cases more than in the other.

IV. *The Writing under Statutes against Forgeries.*

§ 548. **Needless Legislation.** — From the earliest times to the present, a legislative mania seems to have prevailed on this subject of forgery. The reader has seen that the common law is

[1] The State *v.* Humphreys, 10 Humph. 442. See Reg. *v.* Taylor, 4 Fost. & F. 511; People *v.* Krummer, 4 Parker C. C. 217; Thompson *v.* The State, 49 Ala. 16.

[2] Snell *v.* The State, 2 Humph. 347.

[3] Ante, § 543.

broad enough to cover all sorts of forgeries which, in their nature, can be harmful either to individuals or the community; yet this has not satisfied the law makers, who, nevertheless, have piled statute on statute upon the top of the common law to overwhelm it. The reason for this, however, has largely been, that, since forgery is only misdemeanor at the common law, it was deemed advisable to make particular species of it felony; or, if the statute has still left the new forgery a misdemeanor, it has made some provision respecting it not within the rules of the common law.

§ 549. *Old English Statutes as Common Law in our States:* —

Not, in General. — Are there old acts of Parliament which are common law with us? The principal ancient ones, and many modern, are collected by Hawkins;[1] but an examination of them will show, that probably no one which he mentions could ever have had any practical force here, unless it be —

5 Eliz. c. 14. — Concerning this statute (A. D. 1562), Kilty says, there were formerly indictments upon it in Maryland; though, at the time when he wrote, it was superseded by a statute of the State.[2]

§ 550. **Stat. 5 Eliz. c. 14, continued.** — It enacts, that (§ 2), "if any person or persons whatsoever, upon his or their own head and imagination, or by false conspiracy and fraud with others, shall wittingly, subtilely, and falsely forge or make, or subtilely cause or wittingly assent to be forged or made, any false deed, charter, or writing sealed, court roll, or the will of any person or persons in writing, to the intent that the state of freehold or inheritance of any person or persons of, in, or to any lands, tenements, or hereditaments, freehold or copyhold, or the right, title, or interest of any person or persons of, in, or to the same, or any of them, shall or may be molested, troubled, defeated, recovered, or charged; or shall pronounce, publish, or show forth in evidence any such false and forged deed, &c., as true, knowing the same to be false and forged as is aforesaid, to the intent above remembered; and shall be thereof convicted, either upon action or actions of forger of false deeds, to be founded upon this statute, at the suit of the party grieved, or otherwise according to the order and due course of the laws of this realm, or upon bill or infor-

[1] 1 Hawk. P. C. Curw. ed. p. 266 et seq.

[2] Kilty Report of Statutes, 167 The Pennsylvania judges do not mention this statute as in force in that State. Report of Judges, 3 Binn. 595. See post, § 553.

mation to be exhibited into the court of the star-chamber, according to the order and use of that court; shall pay unto the party grieved his double costs and damages, &c., and also shall be set upon the pillory in some open market town, or other open place, and there to have both his ears cut off, and also his nostrils to be slit and cut and seared with a hot iron, so as they may remain for a perpetual note or mark of his falsehood, and shall forfeit to the queen, &c., the whole issues and profits of his lands and tenements during his life, and also shall suffer and have perpetual imprisonment," &c.

§ 551. **Continued.** — By § 3, if, in like manner, any one shall forge, or assent to the forgery of, "any false charter, deed,[1] or writing, to the intent that any person or persons shall or may have or claim any estate or interest for term of years of, in, or to any manors, lands, &c., or any annuity in fee-simple, fee-tail, or for term of life, lives, or years; or shall, as is aforesaid, forge, &c., any obligation, or bill obligatory,[2] or any acquittance, release,[3] or other discharge of any debt, account, action, suit, demand, or other thing personal;[4] or shall pronounce, publish, or give in evidence[5] any such, &c., as true, knowing the same to be false and forged,[6] and shall be thereof convicted, &c., he shall pay unto the party grieved his double costs and damages,[7] and shall be also set upon the pillory in some open market town, or other open place, and there to have one of his ears cut off, and shall also have and suffer imprisonment by the space of one whole year, without bail or mainprise."

§ 552. **Continued.** — Subsequent sections provide, that a second commission of the offence, after a conviction, shall be felony without benefit of clergy; and these sections exempt from the penalty of the statute certain persons mentioned, when they commit a literal violation through ignorance,[8] — an exemption

[1] Post, § 567.

[2] Post, § 566.

[3] Post, § 564, 565.

[4] The forgery of a deed containing a gift of mere personal chattels is not within any of these words. 1 Hawk. P. C. Curw. ed. p. 300, § 21.

[5] Stat. Crimes, § 306–309.

[6] He who is truly informed by another knows it. 1 Hawk. P. C. Curw. ed. p. 300, § 23.

[7] Lord Coke says, it has been adjudged, that, if there is a bond with penalty, the double damages are double the penalty; "for the penalty should be recovered by law if the forged release had not been." 3 Inst. 172, — a reason which shows the proposition not to be universally true.

[8] 1 Hawk. P. C. Curw. ed. 298, 299.

which the common law would make without the special provision. And, by construction, —

Second Offence. — One who has been found guilty of publishing a forged deed may commit the felony of a second offence as well by forging as by publishing another deed; for the words are, "If any person or persons, being hereafter convicted or condemned of any of the offences aforesaid, &c., shall, after any such his or their conviction or condemnation, eftsoons commit or perpetrate any of the said offences."[1]

What repealed. — This statute is in fourteen sections, containing other regulations not important to be mentioned here; and it repeals all prior enactments against the "forgery of false deeds, charters, muniments, or writings."

§ 553. **Whether Common Law, again.**[2] — The English punishments for crimes having been nearly superseded in this country by statutory ones,[3] there is little room for this act of 5 Eliz. c. 14, to have more than a declaratory force with us. Yet the practitioner will now and then find a reference to it convenient. Our statutes providing punishments for what was before indictable have ordinarily no repealing effect upon the prior law, whether that law, as inherited by us, was in England common law or statutory.[4]

§ 554. **Stat. 21 Jac. 1.** — Another statute, not mentioned by Hawkins under the head of Forgery,[5] is 21 Jac. 1, c. 26 (A. D. 1623), passed after the first settlements in this country. Perhaps it may have a common-law force in some of the States.[6] It is, "That all and every person and persons which shall acknowledge, or procure to be acknowledged, any fine or fines, recovery or recoveries, deed or deeds enrolled, statute or statutes, recognizance or recognizances, bail or bails, judgment or judgments, in the name or names of any other person or persons not privy or

[1] 1 Hawk. P. C. Curw. ed. 301, § 25; 1 Hale P. C. 686. A few other points of minor importance have been adjudged, as see Hawkins; 3 Inst. 168 et seq.; 1 Hale P. C. 682 et seq.; Hammond on Forgery, parl. ed. 69 et seq. There is no need to state them here.

[2] See ante, § 549.

[3] Vol. I. § 933.

[4] Stat Crimes, § 166–173, 363, 384, 413, 469.

[5] But see "Of Offences against Records," 1 Hawk. P. C. 6th ed. c. 45, § 9, 10, where this statute may be found.

[6] Kilty says there were no prosecutions under it in Maryland. Kilty Report of Statutes, 90. It is not enumerated by the Pennsylvania judges as received in the latter State. Report of Judges, 8 Binn. 595, 623.

consenting to the same, and being thereof lawfully convicted or attainted, shall be adjudged, esteemed, and taken to be felons, and suffer the pains of death, &c., without the benefit or privilege of clergy, &c. § 3. Provided always, That this act shall not extend to any judgment or judgments acknowledged by any attorney or attorneys of record, for any person or persons against whom any such judgment or judgments shall be had or given."[1]

§ 555. **How interpreted — (Bail).** — The courts held that "bail," taken before a judge, is not within this statute until filed and made matter of record in court. "And if it be not filed, the acknowledging thereof in another's name makes not felony, but a misdemeanor only."[2] Neither does this statute include the case of putting in bail under a forged name; because a name forged or fictitious is not another person's name. But such an act is a misdemeanor at the common law.[3]

§ 556. *American Statutes:* —

General View. — Congress and the legislatures of the States have enacted laws against forgery. It would be contrary to the plan of these volumes to insert those statutes here. Every practitioner is supposed to have before him the acts of Congress and the enactments of his own State.

§ 557. **States — United States.** — The reader scarcely needs to be reminded, that the offence of forgery, when it is against the United States, can be punished only under the acts of Congress;[4] while, according to the general doctrine, the statutes of the several States do not supersede the common law, within the jurisdiction of the State tribunals.[5] Accordingly, —

Making Statutory out of Common-law Forgery. — If a statute makes a particular act forgery, which was such at the common law, the offender may be prosecuted under either the statute or the common law at the election of the prosecuting power.[6] Perhaps a partial exception occurs under a peculiar view of statutory interpretation held by the courts of Massachusetts and of some of the other States;[7] yet, —

[1] And see, as to this statute, Hammond on Forgery, parl. ed. p. 81, pl. 301 et seq.

[2] 1 Hale P. C. 696; 1 Hawk. P. C. 6th ed. c. 45, § 10; Timberlye's Case, 2 Sid. 90.

[3] Anonymous, 1 Stra. 384.

[4] Vol. I. § 189–203; Stat. Crimes, § 232, 233, 241–244.

[5] Ante, § 553; Stat. Crimes, § 154, 165; The State *v.* Kimball, 50 Maine, 409.

[6] The State *v.* Jones, 1 McMullan, 236

[7] Stat. Crimes, § 159.

Forgery not covered by Statute. — Even where this exception prevails, an offender is indictable for any common-law forgery which has not been specifically provided for in any statute.[1]

§ 558. **Elevating the Offence to Felony.** — But, as a wrongful act cannot be both a felony and a misdemeanor, if the statute makes a particular forgery, which was a misdemeanor at the common law, a felony, it can be proceeded against only under the statute.[2]

§ 559. *Words used in Statutes to designate the Instrument forged:* —

Generally of the Words. — To a considerable extent, these are the same words which are employed in creating statutory larcenies, and in giving form to various other offences depending on statutes. They were, as far as practicable and convenient, explained in "Statutory Crimes." We shall here repeat some of them, and add others, together with such further illustrations and authorities as may seem to be desirable. Yet the reader should consult, together with these disquisitions, those in the other work.

§ 560. **"Order" — "Warrant" — "Request."** — A common designation of the instrument is, "order for the payment of money, or order for the delivery of goods."[3] Another is, "warrant for

[1] Commonwealth v. Ray, 3 Gray, 441, 448; Commonwealth v. Ayer, 3 Cush. 150, Fletcher, J., observing: "The common law could be superseded only by a statute as broad and comprehensive in its terms as the definition of the offence."

[2] Vol. I. § 787–789, 815.

[3] Stat. Crimes, § 325–331, 335. And see for illustrations, where the question was one of forgery, Reg. v. Illidge, 1 Den. C. C. 404, Temp. & M. 127; Rex v. Froud, 7 Price, 609, 1 Brod. & B. 300, Russ. & Ry. 389; s. c. nom. Rex v. Froude, 3 Moore, 645; Rex v. Harris, 6 Car. & P. 129; Reg. v. Anderson, 2 Moody & R. 469; Rex v. Bamfield, 1 Moody, 416; Reg. v. Carter, 1 Den. C. C. 65; Rex v. McIntosh, 2 East P. C. 942, 956; s. c. nom. Rex v. Mackintosh, 2 Leach, 4th ed. 883; Rex v. Jones, 1 Leach, 4th ed. 53, 2 East P. C. 941; Reg. v. Carter, 1 Car. & K. 741; Rex v. Lockett, 1 Leach, 4th ed. 94, 2 East P. C. 940; Rex v. Richards, Russ. & Ry. 193; Rex v. Ravenscroft, Russ. & Ry. 161; Reg. v. Raake, 2 Moody, 66; The State v. Cooper, 5 Day, 250; Walton v. The State, 6 Yerg. 377; Reg. v. McConnell, 1 Car. & K. 371, 2 Moody, 298; Rex v. Williams, 1 Leach, 4th ed. 114, 2 East P. C. 937; Reg. v. Thorn, Car. & M. 206; People v. Howell, 4 Johns. 296; Tyler v. The State, 2 Humph. 37; Reg. v. Snelling, Dears. 219, 22 Eng. L. & Eq. 597, 23 Law J. N. S. M. C. 8, 17 Jur. 1012; Evans v. The State, 8 Ohio State, 196; Noakes v. People, 25 N. Y. 380; Carberry v. The State, 11 Ohio State, 410; Reg. v. Lonsdale, 2 Cox C. C. 222; Reg. v. Dixon, 3 Cox C. C. 289; Reg. v. Autey, Dears. & B. 294, 7 Cox C. C. 329; Reg. v. Tuke, 17 U. C. Q. B. 296; Reg. v. Reopelle, 20 U. C. Q. B. 260; Reg. v. Mitchell, 2 Fost. & F. 44; Noakes v. People, 25 N. Y. 380; The State v. Lamb, 65 N. C. 419; Reg v. Boreham, 2 Cox C. C. 189.

the payment of money, or warrant for the delivery of goods."[1] And another, "request for the payment of money, or request for the delivery of goods."[2] One of the most obvious propositions, respecting these several forms of instruments, is, that the person making, for example, the order, need not have had authority in fact to draw on the party named as drawee;[3] because the instrument is equally valid on its face,[4] and equally capable of defrauding, whether such authority existed or not. But this proposition, when applied to a "warrant," or an "order," refers, at least according to the English doctrine, only to writings which are such on their face;[5] for, if extrinsic proofs have to be resorted to, then, perhaps, all the facts appearing, there is no "order" or "warrant," though there may be a "request," when the person making the instrument has no disposing power over the funds. But, on these topics, the reader should carefully examine the fuller discussions in the work on Statutory Crimes. In determining whether a particular writing is to be deemed an "order," "warrant," or "request," resort may be had, among other things, to the usages and understanding of the parties.[6]

§ 561. "Promissory Note." — In general terms, any writing which, by mercantile usage, is a promissory note, is such also within the meaning of these statutes. But the particulars may be seen in "Statutory Crimes," and in the cases here cited.[7] A bank-note is a promissory note; and, for a reason stated in the last section, it is equally so in forgery, though the bank purporting to issue it has, like a fictitious person, no existence.[8]

[1] Stat. Crimes, § 326, 332, 333, 335. And see, for illustrations, where the question was one of forgery, Reg. v. McConnell, 1 Car. & K. 371, 2 Moody, 298; Reg. v. Vivian, 1 Car. & K. 719; Reg. v. Thorn, Car. & M. 206; Reg. v. Mitchell, 2 Fost. & F. 44; Reg. v. Pilling, 1 Fost. & F. 324; Reg. v. Autey, Dears. & B., 294, 7 Cox C. C. 329; Reg. v. Ferguson, 1 Cox C. C. 241.

[2] Stat. Crimes, § 326, 334, 335. And see, as to cases of forgery, Rex v. Evans, 5 Car. & P. 553; Rex v. Thomas, 7 Car. & P. 851, 2 Moody, 16; Reg. v. White, 9 Car. & P. 282.

[3] Hale v. The State, 1 Coldw. 167.

[4] Ante, § 541.

[5] Stat. Crimes, § 327–332 et seq.

[6] Reg. v. Kay, Law Rep. 1 C. C. 257.

[7] Stat. Crimes, § 336. And see, for cases of forgery, Rex v. Dunn, 1 Leach, 4th ed. 57; Rex v. Pateman, Russ. & Ry. 455; People v. Wilson, 6 Johns. 320; Reg. v. Keith, Dears. 486, 29 Eng. L. & Eq. 558, 6 Cox C. C. 533, 24 Law J. N. S. M. C. 110, 1 Jur. N. S. 454, 3 Com. Law, 692; People v. Rathbun, 21 Wend. 509; Hobbs v. The State, 9 Misso. 855; Butler v. The State, 22 Ala. 43; People v. Way, 10 Cal. 336; Reg. v. Howie, 11 Cox C. C. 320. In People v. Finch, 5 Johns. 237, the following paper, "Due Jacob Finch one dollar on settlement this day," &c., was held to be a note for the payment of money, within the New York statute.

[8] Reg. v. McDonald, 12 U. C. Q. B. 543.

§ 562. **"Bill of Exchange."** — This instrument is, in substance, governed by the same rules as a promissory note.[1] In forgery, under statutes making it punishable to forge any "bill of exchange," the bill must, to come within the penalty, be on its face completed;[2] and, if it has not the drawer's name, it is not so.[3] Therefore an acceptance to a writing in the form of such a bill, without such name, is not, within 11 Geo. 4 & 1 Will. 4, c. 66, § 4, "an acceptance of a bill of exchange." The statute does not, observed the court, "make it forgery merely to counterfeit an acceptance, but an acceptance of a bill of exchange."[4] And where the instrument was payable to *or order*, the English judges held it to be no bill, there being no payee.[5] But if it is payable to the drawer's own order, there needs no indorsement to make it complete;[6] neither is an acceptance requisite.[7] Whether the name of the drawee must be expressed in the writing seems not entirely clear; a bill simply directed, "at Messrs. P. & Co., bankers," was held in England to be sufficient.[8] Where the document was in the ordinary form of a bill of exchange, but required the drawee to pay to his own order, another objection was sustained; namely, that it was nothing more than a request to a man to pay himself, which, though accepted, imposed no obligation on him to any third person; and so it was no bill.[9] It is not quite certain that this case is, in principle, sound. Does it, for example, accord with the following? On a full examination of authorities, the Massachusetts court held, that, in the language of Foster, J., "an order for the payment of money, drawn by one in his own favor on himself, and by himself ac-

[1] Stat. Crimes, § 338.

[2] Ante, § 529; Reg. *v.* Butterwick, 2 Moody & R. 196; Reg. *v.* Mopsey, 11 Cox C. C. 143.

[3] Reg. *v.* Mopsey, supra.

[4] Reg. *v.* Butterwick, 2 Moody & R. 196.

[5] Rex *v.* Randall, Russ. & Ry. 195.

[6] Rex *v.* Wicks, Russ. & Ry. 149.

[7] Reg. *v.* Smith, 2 Moody, 295; Rex *v.* Wicks, supra.

[8] Reg. *v.* Smith, 2 Moody, 295. The judges considered Gray *v.* Milner, 8 Taunt. 739, to be in point. And see Stat. Crimes, § 335. A comparison, however, of Reg. *v.* Curry, 2 Moody, 218 (the reporter's head-note to which appears to be incorrect), with Reg. *v.* Hawkes, 2 Moody, 60, seems to show, that, as general doctrine, the drawee's name must be expressed; though, under some circumstances, as where there is an acceptance, the defendant is estopped to deny that the instrument is a bill of exchange. And see Rex *v.* Ravenscroft, Russ. & Ry. 161. Reg. *v.* Snelling, Dears. 219, 22 Eng. L. & Eq. 597, 23 Law J. N. S. M. C. 8, 17 Jur. 1012, perhaps affords comfort to those who think the name of the drawee unnecessary.

[9] Reg. *v.* Bartlett, 2 Moody & R. 362. See Rex *v.* Birkett, Russ. & Ry. 251, as to a bank post-bill.

cepted and indorsed, may be treated as a bill of exchange, and so described in an indictment. Such instruments," he added, "are well known in commerce; especially in the case of mercantile firms which have branches in different cities, all composed of the same partners. Perhaps such a bill may also be declared upon as a promissory note. But we agree with the Court of Queen's Bench, in the latest English case on the question, decided in 1852,[1] that 'it is not unjust to presume that it was drawn in this form for the purpose of suing upon it either as a promissory note or a bill of exchange.'"[2]

§ 563. "**Undertaking.**" — Another form of words employed in these statutes is "undertaking for the payment of money, or undertaking for the delivery of goods." Every promissory note is an undertaking for the payment of money, but every such undertaking is not a promissory note, — undertaking being a word of larger meaning. To constitute an undertaking, the consideration need not be expressed in the writing. These and other views on the subject are more fully explained in "Statutory Crimes" and in the cases here cited.[3]

§ 564. "**Receipt.**" — Again, a common form of words is "receipt for money, or receipt for goods." What is a "receipt" also is explained in "Statutory Crimes."[4]

"**Accountable Receipt.**" — Some statutes employ the words "accountable receipt for money, goods, or other property;" and, under such a statute, the following has been held not to be such a receipt: "Boston, August 15th, 1868. Rec'd of Wm. J. Dale, Surgeon General of Mass., my discharge and check No. 6979, for $100;" for, said Chapman, C. J., "it does not acknowledge that

[1] Referring to Lloyd *v.* Oliver, 18 Q. B. 471.

[2] Commonwealth *v.* Butterick, 100 Mass. 12, 16.

[3] Stat. Crimes, § 339. And see Reg. *v.* White, 9 Car. & P. 282; Reg. *v.* Stone, 1 Den. C. C. 181, 2 Car. & K. 364; Reg. *v.* Reed, 8 Car. & P. 623, 2 Lewin, 185; Reg. *v.* Thorn, Car. & M. 206; The State *v.* Humphreys, 10 Humph. 442; Reg. *v.* West, 1 Den. C. C. 258, 2 Car. & K. 496; Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131; Reg. *v.* Mitchell, 2 Fost. & F. 44.

[4] Stat. Crimes, § 341, 342; post, § 565. And for cases of forgery, see Rex *v.* Martin, 7 Car. & P. 549, 1 Moody, 483; The State *v.* Martin, 9 Humph. 55; Reg. *v.* Houseman, 8 Car. & P. 180; Reg. *v.* Vaughan, 8 Car. & P. 276; Rex *v.* Arscott, 6 Car. & P. 408; Reg. *v.* West, 1 Den. C. C. 258, 2 Car. & K. 496; Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131; Kegg *v.* The State, 10 Ohio, 75; Reg. *v.* Inder, 1 Den. C. C. 325; Reg. *v.* Pringle, 2 Moody, 127; Rex *v.* Hope, 1 Moody, 414; Reg. *v.* Hill, 2 Cox C. C. 246; Reg. *v.* Meigh, 7 Cox C. C. 401, Reg. *v.* Gooden, 11 Cox C. C. 672; Reg. *v.* Fitch, Leigh & C. 159, 9 Cox C. C. 160.

any thing has been received which is to be accounted for."[1] Said Martin, B., in an English case: "The forged document, if genuine, would have been evidence that the bank had received the money, and were to be accountable for it. Then why is it not an accountable receipt?"[2] The meaning of the term would seem to be, that a thing has been received for which the person receiving it is liable to account to some other person. Therefore one who utters a forged pawnbroker's duplicate may be indicted for uttering a forged accountable receipt for goods.[3]

§ 565. "Acquittance." — There seems to be little difference, in legal contemplation, between a "receipt" and an "acquittance."[4] Where the custom of bankers was to give, on the deposit of money, receipts in the following form: "Received of A. B. eighty pounds to his credit — this receipt not transferable;" and, on its being returned with A. B.'s name written on it, to repay the money with interest; the judges held, that forging the name of A. B., and getting the money on return of the writing, was forging and uttering an acquittance.[5] And where, to a bill of parcels, — "Mr. John Ladd bought of Eveleth & Child, &c. &c. the above charged to George Carpenter," the defendant added, "by order, Eveleth & Child," — this addition was held by the court to be an acquittance. "It purports to be an acknowledgment by Eveleth & Child, that the goods delivered to the defendant were charged to Carpenter by his order; and this amounts in law to an acquittance or discharge of the defendant."[6] But an instrument professing to be a scrip certificate of the London and South-western Railway Company is neither a receipt and acquittance, nor simply a receipt, nor an undertaking for the payment of money, within Stat. 11 Geo. 4 & 1 Will. 4, c. 66.[7] In like manner, an ordinary railway ticket is neither a receipt nor an acquittance within 24 & 25 Vict. c. 98, § 23.[8] So

[1] Commonwealth *v.* Lawless, 101 Mass. 32. The learned judge refers to Reg. *v.* Moody, Leigh & C. 173; Commonwealth *v.* Talbot, 2 Allen, 161.

[2] Reg. *v.* Moody, supra. And see Stat. Crimes, § 341, note.

[3] Reg. *v.* Fitchie, Dears. & B. 175, 7 Cox C. C. 257, 40 Eng. L. & Eq. 598. See also Reg. *v.* Johnston, 5 Cox C. C. 133; Reg. *v.* Pries, 6 Cox C. C. 165.

[4] See Stat. Crimes, § 343; Rex *v.* Martin, 7 Car. & P. 549, 1 Moody, 483; Hammond on Forgery, parl. ed. p. 86, pl. 317 et seq.

[5] Reg. *v.* Atkinson, 2 Moody, 215.

[6] Commonwealth *v.* Ladd, 15 Mass. 526.

[7] Reg. *v.* West, 1 Den. C. C. 258, 2 Car. & K. 496. Clark *v.* Newsam, 5 Railw. Cas. 69, 1 Exch. 131.

[8] Reg. *v.* Gooden, 11 Cox C. C. 672.

a "clearance," as it is called, from a friendly society, is neither an acquittance nor a receipt. "It purports," said Cockburn, C. J., "to be a certificate that the member receiving it has been a member of the branch granting it, and has paid all dues and demands up to a certain date. The document then goes on: 'We, therefore, hereby authorize any court of the order to accept the said brother as a clearance member, subject to the conditions,' &c. &c. This, therefore, is simply a certificate, and not an acquittance or receipt for money." [1]

§ 566. "Obligation" — "Bill Obligatory." — These words require a sealed instrument. Such, at least, is the doctrine under the before-mentioned [2] statute of 5 Eliz. c. 14.[3] Lord Coke says, that "obligation" is a word "of a large extent; but it is commonly taken, in the common law, for a bond containing a penalty, with condition." [4]

§ 567. "Deed." — A deed is a writing under seal, from one party to another, intended to affect some legal interest. The instrument must not only be written and sealed, but also, according to the ordinary doctrine, delivered.[5] And a power of attorney, signed, sealed, and delivered, to transfer government stock, is held in England to be a deed, within the statutes against forgery.[6] But a letter of orders under the seal of the bishop is not.[7] As to the delivery, we may doubt, whether, in the peculiar offence of forgery, an instrument may not, without it, be a deed; like a promissory note, bill of exchange, or order, not delivered.[8]

§ 568. "Contract." — An indorsement of a promissory note has been held, in Ohio, to be a "contract," within the statute of that State.[9]

§ 569. "Instrument or Writing." — One of the meanings of the word "instrument," other than that now under consideration, was given in the work on Statutory Crimes.[10] The Missouri statute

[1] Reg. *v.* French, Law Rep. 1 C. C. 217, 220.

[2] Ante, § 550.

[3] Hammond on Forgery, parl. ed. p. 79, pl. 296; 3 Inst. 170; 1 Hale P. C. 685. And see Newman *v.* Shyriff, 3 Leon. 170. See Fogg *v.* The State, 9 Yerg. 392.

[4] Co. Lit. 171 *b*.

[5] Co. Lit. 171 *b*; Goddard's Case, 2 Co. 4 *b*, 5 *a*.

[6] Rex *v.* Fauntleroy, 1 Moody, 52, 2 Bing. 413, 1 Car. & P. 421.

[7] Reg. *v.* Morton, Law Rep. 2 C. C. 22, 12 Cox C. C. 456.

[8] And see Reg. *v.* Davies, 2 Moody, 177.

[9] Poage *v.* The State, 3 Ohio State, 229.

[10] Stat. Crimes, § 314, 319.

against forgery has the clause, — "any instrument or writing, being or purporting to be the act of another, by which any pecuniary demand or obligation shall be, or purport to be, transferred, created, increased, discharged, or diminished; or by which any right of property whatsoever shall be or purport to be transferred, conveyed, discharged, increased, or in any manner affected." And a county warrant was adjudged to be within the statute.[1]

§ 570. "Enrolment, Registry, or Record." — These statutory words were held, in Pennsylvania, to include the public records of the surveyor-general's office. They "are not confined to records of courts of justice. Every registry or enrolment, directed by law and preserved for the use of the public, is embraced by this act of assembly."[2] In Ohio, a tax duplicate is not a "record," within the statutes against forgery.[3]

§ 570 *a*. "Indorse" — "Indorsement." — To indorse is to write upon; and a bill of exchange or promissory note is indorsed by writing the matter, whatever it is, across the face or back of it.[4] But it is plain that, within the doctrine of our last sub-title, the indorsement, to be the subject of forgery, must be of something which, if it were genuine, would be of legal efficacy.

§ 570 *b*. "Security." — A "security for the payment of money" is something else than money.[5] But an "I. O. U." is such a security.[6]

§ 571. Foreign Securities. — These statutes apply as well to instruments issued under the laws of foreign States as to domestic ones.[7] And in foreign instruments, it seems, not so exact a technical accuracy will be required as in our own.[8] Moreover, a statute of New York against forging "any deed or writing sealed, with intent to defraud any person," was held to embrace

[1] The State *v.* Fenly, 18 Misso. 445.

[2] Ream *v.* Commonwealth, 3 S. & R. 207.

[3] Smith *v.* The State, 18 Ohio State, 420.

[4] Commonwealth *v.* Butterick, 100 Mass. 12, 16; Rex *v.* Arscott, 6 Car. & P. 408; Reg. *v.* Winterbottom, 1 Den. C. C. 41, 2 Car. & K. 37, 1 Cox C. C. 164; Rex *v.* Bigg, 1 Stra. 18, 2 East P. C. 882, 3 P. Wms 419.

[5] Stat. Crimes, § 217. For authorities as to what is a "security," see Ib § 340.

[6] Reg. *v.* Chambers, Law Rep. 1 C. C. 341, 12 Cox C. C. 109.

[7] Stat. Crimes, § 326. See People *v.* Wilson, 6 Johns. 320.

[8] Rex *v.* Goldstein, 7 Moore, 1, 3 Brod. & B. 201, 10 Price, 88, Russ. & Ry. 473.

the case of a forgery, within the State, of a deed of lands lying without the State.[1]

V. *The Act by which Forgery is committed.*

§ 572. **Writing or Printing Entire Instrument.** — The most obvious way of forging is to write or print, as the case may be [2] the whole imitation of a real or imaginary original.

Photography. — A forgery may likewise be committed by the use of the photographic art.[3]

Signature — Mark. — To write a signature is the same in law as to write the entire instrument.[4] And the signature, in forgery, may be made by a mark, precisely as in civil jurisprudence.[5]

§ 573. *Alteration of a Genuine Instrument:* —

To alter is to forge. — Any alteration of a written instrument whereby its legal effect is in any degree varied,[6] is an act sufficient in forgery.[7] The indictment in such a case may, if the pleader chooses, lay the offence as a forgery of the entire instrument; for in law it is such.[8] And this is so even where the indictment is drawn upon a statute which makes it penal to "forge or alter."[9] Plainly, in the last-mentioned instance, the word "alter" may be used equally well; and, even in an indictment at the common law, the same word may probably be employed instead of the usual and better word forge.[10]

§ 574. **Illustrations.** — The following are illustrations of changing the effect of an instrument by altering it, so as to constitute forgery; the addition of the words "in full of all demands," in a receipt;[11] the substitution of these words for the words "in

[1] People *v.* Flanders, 18 Johns. 164. It is the same of a domestic indorsement of a bill of exchange drawn abroad. Reg. *v.* Roberts, 7 Cox C. C. 422. And see Vol. I. § 143.

[2] Ante, § 525.

[3] Reg. *v.* Rinaldi, Leigh & C. 330, 9 Cox C. C. 391. And see Ex parte Holcomb, 2 Dillon, 392.

[4] Powell *v.* Commonwealth, 11 Grat. 822; Pennsylvania *v.* Misner, Addison, 44; Rex *v.* Fitzgerald, 1 Leach, 4th ed. 20, 2 East P. C. 953; The State *v.* Davis, 69 N. C. 313.

[5] Rex *v.* Dunn, 1 Leach, 4th ed. 57, 2 East P. C. 962. And see Rex *v.* Fitzgerald, 1 Leach, 4th ed. 20, 2 East P. C. 953.

[6] Archb. Pl. & Ev. 358; Hammond on Forgery, parl. ed. p. 120, pl. 411.

[7] Rex *v.* Bigg, 1 Stra. 18; Anonymous, 1 Anderson, 101, 102; The State *v.* Wooderd, 20 Iowa, 541; Reg. *v.* Griffiths, Dears. & B. 548, 7 Cox C. C. 501.

[8] Rex *v.* Dawson, 2 East P. C. 978, 1 Stra. 19; Commonwealth *v.* Woods, 10 Gray, 477.

[9] Rex *v.* Teague, Russ. & Ry. 33, 2 East P. C. 979.

[10] See 1 Stark. Crim. Pl. 2d ed. 98, 99, Am. ed. 107, 108.

[11] Upfold *v.* Leit, 5 Esp. 100.

part;"[1] the changing of one figure or word into another in a bank-note, bond, or other like instrument, whereby it appears to be of a higher denomination,[2] even though its language becomes thereby ungrammatical, as if it reads "ten *pound*," instead of ten *pounds*;[3] making an indorsement upon negotiable paper general instead of special;[4] putting a seal to a genuine signature to a document which, to be valid, required a seal;[5] inserting in an indictment the name of a person against whom it was not found;[6] making a lease of the manor of Dale appear, by changing D into S, to be of the manor of Sale;[7] altering the date of an accepted bill, so as to show an earlier day of payment.[8] But, as to the date, —

§ 575. **Changing Date.** — There may be circumstances in which the date of a written instrument is both really and apparently immaterial, when, therefore, an alteration in it will not be indictable, however fraudulently intended;[9] but generally the date is in some way material, and then the other consequence follows.[10] And where the prisoner, a pay-sergeant, having obtained from the pay-master a receipt for a sum of money as part subsistence of the company for the month of May, changed the word "May" to "June," and so got a customary advance from a tradesman, an indictment describing the instrument as a receipt was held to be good.[11]

§ 576. **Altering to give Currency.** — If negotiable paper is so altered as to give it greater currency, though not to place new parties under absolute obligation to pay it, this seems to have been deemed forgery. Thus, —

Changing Place of Payment. — Where a note, made in the body

[1] The State *v.* Floyd, 5 Strob. 58.

[2] Rex *v.* Dawson, 1 Stra. 19, 2 East P. C. 978; The State *v.* Waters, 3 Brev. 507, 2 Tread. 669; Rex *v.* Teague, Russ. & Ry. 33, 2 East P. C. 979; Blake *v.* Allen, Sir F. Moore, 619; Rex *v.* Elsworth, 2 East P. C. 986; Rex *v.* Post, Russ. & Ry. 101; Goodman *v.* Eastman, 4 N. H. 455; Haynes *v.* The State, 15 Ohio State, 455. See Rex *v.* Wilcox, Russ. & Ry. 50; Reg. *v.* Sargent, 10 Cox C. C. 161; The State *v.* Monnier, 8 Minn. 212

[3] Rex *v.* Post, Russ. & Ry. 101.

[4] Rex *v.* Birkett, Russ. & Ry. 251.

[5] Reg. *v.* Collins, 1 Cox C. C. 57.

[6] Rex *v.* Marsh, 3 Mod. 66.

[7] 3 Inst. 169.

[8] Master *v.* Miller, 4 T. R. 320.

[9] See Griffith *v.* Cox, 1 Tenn. 210; Howe *v.* Thompson, 2 Fairf. 152.

[10] The State *v.* Kattleman, 35 Misso. 105, 107. And see Bowers *v.* Jewell, 2 N. H. 543; Stephens *v.* Graham, 7 S. & R. 505; United States Bank *v.* Russel, 3 Yeates, 391; Pankey *v.* Mitchell, Breese, 301; Mitchell *v.* Ringgold, 3 Har. & J. 159.

[11] Rex *v.* Hope, 1 Moody, 414.

of it payable at a banker's who had failed, was so altered as to be payable at a solvent banker's, the majority of the English judges sustained an indictment for forgery.[1] And the Alabama judges held, in a civil suit, that the erasure of the place at which a note is made payable is such an alteration of it as renders it void.[2] And, —

Address of Party. — It is forgery to put an address to the name of a drawee of a bill of exchange, in the course of completion, with intent to make the acceptance appear to be that of a different person.[3] Again, —

Two Banks of same Name. — If, in two different cities there are banks of the same name, the one solvent and the other insolvent, a substitution on the bills of the latter bank of the name of the city, whereby they appear to be of the former bank, is a forgery.[4] In the two last cases new liabilities are created. In like manner, —

Adding Name. — To forge a name to a valid check, with a view to getting it cashed on the strength of the name, is forgery.[5]

§ 577. **Legal Effect.** — The alteration, to be sufficient, must be material. Therefore, —

"Beautiful." — If a conveyance of the manor of Dale is made to read "the beautiful manor of Dale," this will not be forgery.[6] So, —

Subscribing Witness. — If there is a bond, not required by law to be attested by a subscribing witness, no forgery is committed by falsely adding to it a witness's name.[7]

In General. — It is not forgery to add to a written instrument any word which the law would supply.[8] Such alterations do not change in any degree the legal effect of the instrument. Therefore they are not forgery.[9]

§ 578. **Destroy Instrument — In full — In part.** — To destroy an

[1] Rex *v.* Treble, Russ. & Ry. 164, 2 Leach, 4th ed. 1040, 2 Taunt. 328.

[2] White *v.* Hass, 32 Ala. 430.

[3] Reg. *v.* Blenkinsop, 1 Den. C. C. 276, 2 Car. & K. 531. And see Reg. *v.* Epps, 4 Fost. & F. 81; Reg. *v.* Mitchell, 1 Den. C. C. 282, note; Reg. *v.* Mahony, 6 Cox C. C. 487.

[4] The State *v.* Robinson, 1 Harrison, 507.

[5] Reg. *v.* Wardell, 3 Fost. & F. 82.

[6] Rex *v.* Treble, 2 Leach, 4th ed. 1040, 1042.

[7] The State *v.* Gherkin, 7 Ire. 206.

[8] The State *v.* Cilley, cited 1 N. H. 97; Hunt *v.* Adams, 6 Mass. 519.

[9] See also Burkholder *v.* Lapp, 7 Casey, 322.

instrument is not to forge it. Therefore, if, on the back of a bond, there is written an acquittance of the bond, it is not forgery to obliterate the acquittance;[1] it being, the reader perceives, in legal effect a separate instrument, though written on the same piece of paper as the bond. But the offence may be committed by taking out a part of a writing, if thereby a different operation is given to what is left.[2] Severing the indorsement from a promissory note, leaving the note entire, is not forgery within the Vermont statute; but the court said, it is a misdemeanor at the common law, "as great a crime against the public justice and the public peace as those forgeries that are clearly within the statute."[3] In Iowa it was well adjudged that, where a party detached from a written instrument a condition originally annexed thereto, and forming with it one entire contract, the effect of which was to render the instrument apparently negotiable while before it was not, the transaction constituted a forgery.[4]

§ 579. *Executing Instrument as Agent:* —

Not Forgery in Agent authorized. — If a man writes another's name by his authority, it is not forgery.[5]

Erroneous Belief of Authority. — And according to principles laid down in the preceding volume,[6] if in fact he has not authority, but, acting on a fair ground of reason, without fault or carelessness, believes himself authorized, he does not commit the offence.[7] Suppose, for instance, a person has on three or four occasions made the acceptance of another to bills of exchange, the other having always paid them without remark or remonstrance, he may infer from this course of business that he is, on a subsequent occasion, authorized.[8]

Authority erroneously admitted. — It seems to have been laid down that, if the person whose name is alleged to be forged, on being notified directly afterward of the use of his name, does not at once repudiate it, there can be no conviction of the

[1] The State *v.* Thornburg, 6 Ire. 79. And See Commonwealth *v.* Hayward, 10 Mass. 34.

[2] Combe's Case, Sir F. Moore, 759, Noy, 101; Hammond on Forgery, parl. ed. p. 125.

[3] The State *v.* McLeran, 1 Aikens, 311. See The State *v.* Norton, 3 Zab. 33.

[4] The State *v.* Stratton, 27 Iowa, 420.

[5] Shanks *v.* The State, 25 Texas, Supp. 326.

[6] Vol. I. § 303.

[7] Rex *v.* Parish, 8 Car. & P. 94; Rex *v.* Forbes, 7 Car. & P. 224; Reg. *v.* Clifford, 2 Car. & K. 202; Reg. *v.* Beard, 8 Car. & P. 143; Reg. *v.* Rogers, 8 Car & P. 629.

[8] Reg. *v.* Beard, 8 Car. & P. 143.

offender.[1] Now, in principle, such matter ought to constitute, before the jury, a considerable obstacle to a conviction; because, if such was the conduct of the person alleged to be injured, a strong presumption of fact would arise that the accused person acted with the tacit connivance, if not the open consent, of the other. But that is all. If the forger acted wholly without authority, and knew he did, he committed the offence of forgery; and, when it was committed, a pardon could proceed only from the executive authority of the State. Persons offended against by the criminal laws have no pardoning power. The rule prevailing in the civil suit, on forged paper of this sort, is not, in reason, applicable in the criminal.

§ 580. **Agent disobeying Instructions.** — Obviously a specific authority to do a particular thing does not involve the authority to do another and different thing. And this principle has been carried in England to the extent, that, —

Wrongly filling Blank. — If a person gives to his clerk a blank check on a bank,[2] or a blank bill of exchange,[3] signed by himself, with direction to fill the blank with a sum named, and the clerk fraudulently fills it with a larger sum, the latter commits a forgery.[4] And there is American authority to the like effect.[5]

Omitting Bequest from Will. — Upon the same principle rests an old case in which it was held, that, if one employed to draw a will omits a bequest, and thereby gives to another bequest a different operation from what it was intended to have, he commits this offence.[6]

§ 581. **Wrongly filling Blank, continued.** — On the other hand it was held in Massachusetts, in a civil suit brought by an innocent indorsee, that, where the defendant, a merchant, had written his name on blank pieces of paper, and intrusted them to his clerk, who was to fill out promissory notes; but a third person got by

[1] Reg. *v.* Smith, 3 Fost. & F. 504, at the assizes before Byles, J.

[2] Rex *v.* Wilson, 2 Car. & K. 527, 1 Den. C. C. 284; Reg. *v.* Bateman, 1 Cox C. C. 186.

[3] Rex *v.* Hart, 1 Moody, 486, 7 Car. & P. 652.

[4] See also Rex *v.* Atkinson, 7 Car. & P. 669. See The State *v.* Flanders, 38 N. H. 324; Reg. *v.* Richardson, 2 Fost. & F. 343.

[5] The State *v.* Kroeger, 47 Misso. 552; Commonwealth *v.* Work, 3 Pittsb. 493; Van Duzer *v.* Howe, 21 N. Y. 531, 537.

[6] Combe's Case, Sir F. Moore, 759, Noy, 101. See Marvin's Case, 3 Dy. 288, pl. 52.

false pretences possession of them from the clerk, and filled the note in suit to his own use; this act of the third person was not forgery. Consequently the plaintiff was permitted to recover.[1]

§ 582. **"Per Procuration" — Not authorized.** — But the English courts seem to have laid down the further doctrine, that, if the instrument appears on its face to have been executed by an agent authorized, while in truth he was not so, this apparent agent is not guilty of forgery. Thus, where one asked to have a bill discounted on behalf of Thomas Tomlinson, and, the bill not being indorsed, said he had power from Tomlinson to indorse it; whereupon the prosecutor wrote on it the words, "Per procuration, Thomas Tomlinson," under which the prisoner subscribed his own name; the judges held, that he was wrongly convicted of forging it; "and that indorsing a bill of exchange, under a false assumption of authority to indorse it per procuration, is not forgery, there being no false making." In the course of the argument, Parke, B., put the question to the prisoner's counsel, how it would stand if the prisoner had said, "I am authorized by Mr. Tomlinson to write his name," and had written it in the presence of the other. The counsel replied, that, he would submit, this would be no forgery.[2]

§ 583. **Personating another and writing his Name.** — Of course, if a man personates another, and fraudulently writes such other's

[1] Putnam *v.* Sullivan, 4 Mass. 45. "The objection," said Parsons, C. J., "would have great weight, if, when the indorsers (the defendants in the civil suit) put the name on the paper, they had not intended that something should afterwards be written, to which the name should apply as an indorsement; for then the paper would have been delivered over unaccompanied by any trust or confidence. If the clerk had fraudulently, and for his own benefit, made use of all the indorsements for making promissory notes to charge the indorsers, we are of opinion that this use, though a gross fraud, would not be in law a forgery, but a breach of trust. And for the same reason, when one of these indorsements was delivered by the clerk, who had the custody of them, to the promisor, who by false pretences had obtained it, the fraudulent use of it would not be a forgery; because it was delivered with the intention that a note should be written on the face of the paper by the promisor, for the purpose of negotiating it as indorsed in blank by the house. And we must consider a delivery by the clerk, who was intrusted with a power of using these indorsements (although his discretion was confined) as a delivery by one of the house; whether he was deceived, as in the present case, or had voluntarily exceeded his directions. For the limitation imposed on his discretion was not known to any but to himself and to his principals." See Van Duzer *v.* Howe, 21 N. Y. 531; The State *v.* Flanders, 38 N. H. 324.

[2] Reg. *v.* White, 2 Car. & K. 404, 1 Den. C. C. 208. And see Rex *v.* Maddocks, 2 Russ. Crimes, 3d Eng. ed. 499; Rex *v.* Arscott, 6 Car. & P. 408.

name, it is forgery;[1] for this is the common case, and it requires no illustration.

Assuming Fictitious Name. — The same follows if he assumes a mere fictitious name;[2] and it makes no difference that his real name would do as well.[3] In these cases there must be clear proof that the name is not the prisoner's; and, if he has before gone by the one assumed, or, it would even seem, if the name was not taken for this particular instance of fraud, there is no forgery.[4] When a man in words calls himself by another's name, but writes his own, he does not commit forgery.[5]

§ 584. *Making in one's own Name a false Writing to defraud:* —

How in England. — Lord Coke says that forgery "is properly taken when the act is done in the name of another person." Yet there is a doctrine, stated also by Coke,[6] which seems to rest on ancient adjudication, and is sustained by the English commissioners in their report of 1840, namely, that, to use their own language, "an offender may be guilty of a false making of an instrument, although he sign and execute it in his own name, in case it be false in any material part, and calculated to induce another to give credit to it as genuine and authentic, when it is false and deceptive. This happens where one, having conveyed land, afterwards, for the purpose of fraud, executes an instrument purporting to be a prior conveyance of the same land. Here the instrument is designed to obtain credit by deception, as purporting to have been made at a time earlier than the true time of its execution."[7]

[1] Dixon's Case, 2 Lewin, 178.

[2] Ante, § 543; Rex *v.* Francis, Russ. & Ry. 209; Rex *v.* Parkes, 2 Leach, 4th ed. 775, 2 East P. C. 963, 992.

[3] Rex *v.* Whiley, Russ. & Ry. 90; Rex *v.* Marshall, Russ. & Ry. 75; Rex *v.* Taft, 1 Leach, 4th ed. 172, 2 East P. C. 959.

[4] Rex *v.* Bontien, Russ. & Ry. 260; Rex *v.* Peacock, Russ. & Ry. 278; Rex *v.* Watts, Russ. & Ry. 486, 3 Brod. & B. 197; Rex *v.* Aickles, 1 Leach, 4th ed. 438, 2 East P. C. 968; Rex *v.* Shepherd, 2 East P. C. 967, 1 Leach, 4th ed. 226; Reg. *v.* Whyte, 5 Cox C. C. 290.

[5] Rex *v.* Story, Russ. & Ry. 81. And see Rex *v.* Hevey, Russ. & Ry. 407, note, 2 East P. C. 856, 1 Leach, 4th ed. 229. It has been held, that, where a man with intent to defraud writes the name of a fictitious firm, of which he represents himself to be a member (in a case wherein the name of the firm included his own name), he does not commit a forgery. "As a general rule," said Thomas, J., "to constitute forgery, the writing falsely made must purport to be the writing of another party than the person making it. The mere false statement or implication of a fact, not having reference to the person by whom the instrument is executed, will not constitute the crime." Commonwealth *v.* Baldwin, 11 Gray, 197, 198.

[6] 3 Inst. 169.

[7] 5th Rep. Eng Crim. Law Com. A. D

Fraudulently antedating own Deed. — A case exactly confirmatory of this old doctrine passed to final judgment in 1859. After a man who was the owner of some lands had parted with them by deeds duly executed, and his grantee had taken possession, he made to his son, by indenture signed by both, a conveyance in due form of the greater part of the lands, antedating it to make it appear to have been executed before the real sale took place. Thereupon the son brought against the tenant a suit to eject him, and the latter caused the father and son to be jointly indicted and convicted for forgery. It was argued, on behalf of the prisoners, that "the deed in this case was not forged; because it was really made and executed by the persons by whom it purported to be executed. . . . The date of the deed was false, but a false statement in a deed will not render the deed a forgery." This view of the doctrine, however, did not prevail with the judges, who unanimously held that the defendants were rightly convicted.[1]

§ 585. **How in United States.** — Is this English doctrine law in our States? The writer has before him nothing on this question, from any American source, subsequent to the English case just stated. The Massachusetts commissioners, in their report of 1844, discard the doctrine, not even conceding it to be the better

1840, p. 66; S. P. Act of Crimes and Punishments, A. D. 1844, p. 205. The same doctrine is laid down in Pulton de Pace, 46 *b*; 1 Hale P. C. 683; 1 Hawk. P. C. Curw. ed. p. 263, 264, § 2; 2 East P. C. 855; 1 Gab. Crim. Law, 352.

[1] Reg. *v.* Ritson, Law Rep. 1 C. C. 200. Not only was there no dissent in this case, but the opinions of the judges, which were separately delivered, were harmonious in form and reasoning. I will copy the principal part of what was said by Kelly, C. B. After observing that all the authorities on the point are ancient, he proceeds: "When, however, we look to all these authorities, and to the text writers of the highest reputation, such as Comyns (Dig. Forgery, A I), Bacon (Abr. Forgery, A), and Coke (3 Inst. 169), we find there is no conflict of authority. Sir M. Foster (Foster Crown Cas. 116), Russell on Crimes (Vol. II. p. 709, 4th ed.), and other writers, also all agree. The definition of forgery is not, as has been suggested in argument, that every instrument containing false statements fraudulently made is a forgery; but, adopting the correction of my brother Blackburn, that every instrument which fraudulently purports to be that which it is not is a forgery, whether the falseness of the instrument consists in the fact that it is made in a false name; or that the pretended date, when that is a material portion of the deed, is not the date at which the deed was in fact executed. I adopt this definition. It is impossible to distinguish this case in principle from those in which deeds made in a false name are held to be forgeries. There is no definition of forgery in 24 & 25 Vict. c. 98, but the offence has been defined by very learned authors, and we think this case falls within their definitions." p. 203.

doctrine in authority; and they deem it contrary to sound principle.[1] We have also some judicial intimations of the like sort.[2] But, of American authority, there is nothing of which the author is aware, on either side of the question.

How in Principle. — To the writer it appears plain, that the limits of the offence of forgery depend, in the nature of it, not much on general reasoning, but mainly on technical rule, — in other words, as the question should be viewed by us, on what is laid down in the old books on the English law. For no solid reason can be suggested why, on this question, we should not accept the English doctrine, as it existed when this country was settled, the same as we do on most other questions. When we look into these books, we find that authority is all one way. Said Blackburn, J., in the English case just cited: "There is no definition of 'forge' in the statute, and we must therefore inquire what is the meaning of the word. The definition in Comyns (Dig. tit. Forgery, A, I), is 'Forgery is where a man fraudulently writes or publishes a false deed or writing to the prejudice of the right of another,' — not making an instrument containing that which is false, which, I agree with Mr. Torr, would not be forgery, but making an instrument which purports to be that which it is not. Bacon's Abr. (tit. Forgery, A), which, it is well known, was compiled from the MS. of Chief Baron Gilbert, explains forgery thus: 'The notion of forgery doth not so much consist in the counterfeiting of a man's hand and seal . . . but in the endeavoring to give an appearance of truth to a mere deceit and falsity, and either to impose that upon the world as the solemn act of another which he is in no way privy to, or at least to make a man's own act appear to have been done at a time when it was not done, and by force of such a falsity to give it an operation which in truth and justice it ought not to have.' The material words, as applicable to the facts of the present case, are,

[1] Rep. of Pen. Code, tit. Forgery, p. 5 and note.

[2] Thus, in Commonwealth *v.* Baldwin, 11 Gray, 197, 198, Thomas, J., speaking of this old doctrine, as laid down by Lord Coke, 3 Inst. 169, says: "We fail to understand on what principle this case can rest. If the instrument had been executed in the presence of the feoffee and antedated in his presence, it clearly could not have been deemed forgery. Beyond this, as the feoffment took effect, not by the charter of feoffment, but by the livery of seisin, — the entry of the feoffor upon the land with the charter, and the delivery of the twig or clod in the name of the seisin of all the land contained in the deed, — it is not easy to see how the date could be material."

'to make a man's own act appear to have been done at a time when it was not done.' When an instrument professes to be executed at a date different from that at which it really was executed, and the false date is material to the operation of the deed, if the false date is inserted knowingly and with a fraudulent intent, it is a forgery at the common law. . . . All the text-books agree, and there is no single authority against the definition I have stated. Mr. Torr, however, says that the definition is old. I think that gives it all the greater weight."[1] Plainly the broad doctrine is not maintainable, that it is incompetent for a man to commit forgery of an instrument executed by himself. If, for example, after he had signed, sealed, and delivered a deed, he should surreptitiously, getting it into his temporary possession, alter it to accomplish some fraud, this would be forgery.[2] And if one alters a document which he has previously forged, he commits a new offence.[3]

§ 586. **Books of Account.** — We have seen,[4] that books of account may be the subject of forgery. They are admissible in court as evidences of debt, and are otherwise of legal validity. Therefore, —

Altering. — If the confidential clerk in a mercantile house makes in its books, even in the journal, an alteration of a figure, representing the cash received to be less than in fact it was, to enable him to abstract the difference between the real and false sum, this is forgery.[5] There could not be imagined any case more completely within the definition and legal understanding of forgery than this. Yet the line is not so distinct as we might desire, separating it from cases of a like kind which are not forgery. Thus, —

False Books. — It is plain in reason, that not every false entry in a book of accounts, made for purposes of fraud, is forgery. Consequently a New Hampshire case holds, that a man does not commit this offence who makes a false charge in his own book of account. Sargent, J., said: "To forge a writing necessarily implies that a writing be made which shall appear and purport to be

[1] Reg. *v.* Ritson, Law Rep. 1 C. C. 200, 203, 204.

[2] And see Commonwealth *v.* Mycall, 2 Mass. 136; The State *v.* Greenlee, 1 Dev. 523; People *v.* Fitch, 1 Wend. 198; The State *v.* Young, 46 N. H. 266.

[3] Rex *v.* Kinder, 2 East P. C. 856.

[4] Ante, § 529.

[5] Biles *v.* Commonwealth, 8 Casey, 529.

something which it is not in fact, or that a writing be so changed or altered that it shall not be or purport to be what it was designed to be. But in making a false account, the writing is what it was designed to be."[1] And the Court of Queen's Bench in England, in an extradition case, laid down the doctrine, that, by the common law prevailing both in England and generally in the United States, this sort of act is not forgery. The particular instance was, that the paying teller of a bank, falsely and with intent to defraud, entered in the proof book of the bank kept by him a certain sum as assets of the bank, whereas the assets did not amount to that sum; and this was held not to be forgery by the common law, though it was by the statutes of New York.[2]

How in Principle. — The question as to the true distinction between the altering of a book of accounts, and the making of a false original entry, may be stated thus: In order to render a false entry or alteration in such a book forgery, it must purport to be what it is not, and to be of legal validity. If one fraudulently alters a book of accounts, whether originally kept by himself or by another, it ceases to be what it purports; namely, the actual record of transactions made when they occurred. Therefore he commits forgery. But if he simply enters a false charge against one, he does not thereby substitute a false record for the true original, he merely creates an original record which is not true in fact. To do this is not forgery. But, suppose he makes a false charge which he antedates, falsely appearing to have been made at the time of the transaction, with the fraudulent intent to pass it off as an original entry, then the question is the same as where a man antedates his own deed for fraud. Still, in all these circumstances, the book of accounts, like any other writing of which forgery may be committed, must be of some real or apparent legal validity. Now, the effect of books of accounts differs in different States; and thus we come to a complication of the question not best to be further discussed in this connection.

§ 587. *Different Persons of one Name or Address:* —

Signing one's own Name as that of another. — But there are many

[1] The State *v.* Young, 46 N. H. 266, 270. The court, in this case, did not question the correctness of the Pennsylvania decision.

[2] In re Windsor, 6 B. & S. 522, 10 Cox C. C. 118. That this sort of act is forgery in New York, see also People *v.* Phelps, 49 How. Pr. 462.

persons of one name; and so, if a man forges the name of another, real or fictitious,[1] he cannot excuse himself on the ground that it happens to be identical with his own.[2] For example, when certain goods, consigned to P., of New York, arrived, another P., the exact name, knowing they were not for him, obtained an advance on them by signing over the permit for their delivery, in his own proper handwriting; and this was held to be a forgery.[3] And the same was held, where a bill of exchange, payable to the order of a person, fell into the hands of another of the same name, who indorsed it fraudulently, knowing he was not the one meant.[4] Again, if one gets another to accept a bill in his true name, intending to defraud by representing the name to be another's, this is forgery.[5] And a man may commit the offence by using his own name, though there is no other person than himself of that name; because, as we have seen,[6] there may be a forgery where the person is a mere fiction; and, if the name is understood not to be his own, the case is only the common one of forging a fictitious name.

§ 588. **Wrong Address.** — Though merely adopting a false description is not necessarily a forgery,[7] yet putting an address to the name of the drawee of a bill of exchange, in the course of completion, with the intent to make the acceptance appear to be that of a different existing individual, is such.[8] And if one fraudulently passes off an acceptance as that of a particular person, knowing it to be another's of the same name, he commits forgery.[9] But cases of this general aspect may occur, not within the principles on which these proceed, wherein there should be no conviction.[10]

§ 589. *Procuring one by Stratagem to execute a Writing different from what he intends:* —

Altering Draft. — "Consistently with the principles which govern the offence of forgery," say the English commissioners,

[1] Rex v. Parkes, 2 Leach, 4th ed. 775, 2 East P. C. 963, 992.

[2] Barfield v. The State, 29 Ga. 127.

[3] People v. Peacock, 6 Cow. 72.

[4] Mead v. Young, 4 T. R. 28. And see Reg. v. Rogers, 8 Car. & P. 629.

[5] Reg. v. Mitchell, 1 Den. C. C. 282, note. See Reg. v. Epps, 4 Fost. & F. 81.

[6] Ante, § 543.

[7] Rex v. Webb, Russ. & Ry. 405, 3 Brod. & B. 228, cited 6 Moore, 447.

[8] Rex v. Blenkinsop, 1 Den. C. C. 276, 2 Car. & K. 531.

[9] Reg. v. Epps, 4 Fost. & F. 81.

[10] See Rex v. Watts, Russ. & Ry. 436; Rex v. Parkes, 2 Leach, 4th ed. 775, 2 East P. C. 963, 992; Reg. v. Rogers, 8 Car. & P. 629.

"an instrument may be falsely made, although it be signed or executed by the party by whom it purports to be signed or executed. This happens where a party is fraudulently induced to execute a will, a material alteration having been made in the writing without his knowledge; for, in such case, although the signature be genuine, the instrument is false, because it does not truly indicate the testator's intentions, and it is the forgery of him who so fraudulently caused such will to be signed, for he made it to be the false instrument which it really is."[1]

Misreading. — And in a Maine case, where one who had bargained for an acre of land procured a draft of a deed correctly describing the acre, and had it examined by the grantor; then, the execution of it being deferred, procured another draft, in which was included the whole farm of the grantor, and got the latter to sign it, without examination, under the idea of its being the first draft, — he was held to have committed forgery.[2]

§ 590. **Misreading, continued — False Pretence.** — For these doctrines there appears to be ancient authority;[3] but a modern opinion, perhaps the better one, is, that such an act is only obtaining a signature by a false pretence or token, which may indeed be indictable, yet it is not forgery.[4] Thus in a Pennsylvania case the proof was, that the defendant wrote a promissory note for $141.26, and read it as for $41.26, to another, who, being unable to read, was induced by the false reading to put his name to it as maker, and the court held, that an indictment for forgery could not be sustained.[5]

§ 591. **Altering Unexecuted Instrument.** — And this doctrine leads to another; namely, that, as a general proposition, the alteration

[1] 5th Rep. Eng. Crim. Law Com. A. D. 1840, p. 65; S. P. Act of Crimes and Punishments, A. D. 1844, p. 205.

[2] The State *v.* Shurtliff, 18 Maine, 368, the court observing: "The instrument was false. It purported to be the solemn and voluntary act of the grantor in making a conveyance to which he had never assented. The whole was done by the hand or by the procurement of the defendant. It does not lessen the turpitude of the offence, that the party whom he sought to defraud was made in part his involuntary agent, in effecting his purpose. If he had employed any other hand, he would have been responsible for the act." **Any Fraud.** — In broad terms, it has been laid down, that this offence may be committed by procuring the signature of a party to an instrument of which he had no knowledge, or which he did not intend to sign. Clay *v.* Schwab, 1 Mich. N. P. 168.

[3] Combe's Case, Sir F. Moore, 759, Noy, 101. And see Marvin's Case, 3 Dy. 288, pl. 52.

[4] Vol. I. § 584, and the cases there cited. And see ante, § 156; The State *v.* Flanders, 38 N. H. 324.

[5] Commonwealth *v.* Sankey, 10 Harris, Pa. 390.

of an unexecuted instrument, or one in the course of preparation, but not so far finished as to charge any person, is not forgery.[1]

§ 592. *The Question of Similitude:* —

General Doctrine. — We have seen,[2] that, to constitute the offence of counterfeiting the coin, the counterfeit must be in the similitude of the genuine. This is only an illustration of the principle of the law of criminal attempt, that the act done must have some aptitude to accomplish the thing intended;[3] for, as every man knows the genuine coin, a spurious piece, having no likeness to the genuine, could deceive no one. The same rule applies to the forgery of bank-bills,[4] and of other instruments falling within the like reason.[5] The resemblance need not be exact, but the instrument must be, *prima facie*, fitted to pass for true.[6]

§ 593. **Limit of the Doctrine.** — Among the subjects of forgery, however, are many writings not of a nature to be familiar to the public, or to the particular individuals to be defrauded. The rule of similitude cannot prevail as to them.[7] An illustration of this proposition is where the forgery is of a fictitious name,[8] in which case there can be no similitude, there being no original. The Massachusetts court has held, that a man may be convicted of forging a check on a bank, though the similitude is not such as would be likely to deceive the officers of the bank.[9] And, in reason, if the indictment charged the intent to be to defraud, not the bank, but some third person, there need be no resemblance whatever to the real signature, because the fraud could be as well effected without such resemblance as with.[10]

[1] See and compare Marvin's Case, 8 Dy. 288, pl. 52; Reg. *v.* Cooke, 8 Car. & P. 582; Rex *v.* Wicks, Russ. & Ry. 149; Reg. *v.* Blenkinsop, 1 Den. C. C. 276, 2 Car. & K. 531; Reg. *v.* Illidge, 1 Den. C. C. 404, Temp. & M. 127; Powell *v.* Commonwealth, 11 Grat. 822; Reg. *v.* Turpin, 2 Car. & K. 820; 1 Gab. Crim. Law, 351.

[2] Ante, § 291.

[3] Vol. I. § 738.

[4] Rex *v.* Elliot, 1 Leach, 4th ed. 175, 179; s. c. nom. Rex *v.* Elliott, 2 East P. C. 951; The State *v.* McKenzie, 42 Maine, 392; Dement *v.* The State, 2 Head, 505.

[5] Rex *v.* Collicott, Russ. & Ry. 212, 4 Taunt. 300, 2 Leach, 4th ed. 1048.

[6] Rex *v.* Elliot, supra; Rex *v.* Collicott, supra; Reg. *v.* Mahony, 6 Cox C. C. 487. And see The State *v.* Carr, 5 N. H. 367; 1 Gab. Crim. Law, 354. See The State *v.* Robinson, 1 Harrison, 507, where it was held to be a forgery (ante, § 576) to alter the bills of a broken bank into those of a solvent one of the same name, by pasting the name of the city in which the latter was located over that in which the former was located.

[7] People *v.* Peacock, 6 Cow. 72; ante, § 249.

[8] Ante, § 543.

[9] Commonwealth *v.* Stephenson, 11 Cush. 481. See also Wilkinson *v.* The State, 10 Ind. 372.

[10] See ante, § 587.

§ 594. **How under Statutes.** — Sometimes where the offence is statutory, this question of similitude may be affected by the words of the statute. In New Hampshire, the words being, "any bank-bill or note, in imitation of, or purporting to be, a bank-bill or note which has been or may hereafter be issued by any corporation," &c., — it was held, that the forgery is sufficient though the bank never issued any bill for the same sum;[1] a proposition, however, which probably would not be different at the common law.[2] And under the United States statute of 1816, it was held indictable to issue bills signed by the names of persons, as president and cashier, who never held those offices.[3]

§ 595. **Adapted to cheat.** — The subject of similitude depends on so many considerations, that no general direction concerning it can meet every possible case. But this one suggestion will aid the practitioner; namely, that the instrument must have an adaptation to accomplish some legal wrong,[4] and, failing in this, the false making is not forgery. If, without this similitude, it has this adaptation to perpetrate the fraud, the same as with it, the similitude cannot be regarded as important.

VI. *The Intent.*

§ 596. **Must be evil.** — In forgery, as in all other offences, the act, to be indictable, must proceed from some evil intention.[5]

Public. — Where the forgery is of a public record or the like, in which the injury to the public is the ground of the offence,[6] we are left without specific adjudications concerning the particular nature of the intent required; and so we can only refer to the general doctrines stated in the preceding volume.[7]

Private. — But most forgeries are attempts to cheat individuals; and, concerning these, some points are established, to be explained in succeeding sections.

[1] The State *v.* Carr, 5 N. H. 367; S. P. Commonwealth *v.* Smith, 7 Pick. 137.

[2] But see, as to this, ante, § 541 and note.

[3] United States *v.* Turner, 7 Pet. 132; United States *v.* Brewster, 7 Pet. 164. See as to the word "purporting," Rex *v.* Jones, 1 Leach, 4th ed. 204, 2 East P. C. 883, 1 Doug. 300; The State *v.* Harris, 5 Ire. 287. See also The State *v.* Calvin, R. M. Charl. 151; Commonwealth *v.* Boynton, 2 Mass. 77; Ex parte Holcomb, 2 Dillon, 392.

[4] See ante, § 592.

[5] See Hammond on Forgery, parl. ed. p. 114, pl. 376 et seq.; Reg *v.* Hodgson, Dears. & B. 3, 7 Cox C. C. 122, 36 Eng. L. & Eq. 626; Flint *v.* Craig, 59 Barb. 319.

[6] Ante, § 531, 532.

[7] Vol. I. § 205, 206, 285 et seq.

§ 597. **Specific Intent.** — We have seen [1] that forgery is a species of attempt to cheat. From this doctrine, compared with the doctrine of Attempt as stated in the preceding volume,[2] it might not unnaturally be inferred, that, to constitute forgery, there must exist in the mind of the wrong-doer a specific intent to effect the particular fraud which the false writing is adapted to accomplish. But we are about to see that the adjudged law is not exactly so.

§ 598. *Private Forgeries:* —

Intend a Fraud. — As to this larger and principal class of forgeries, there must be, in the mind of the individual committing the act, what is termed, in the language of the law, an intent to defraud a particular person or persons;[3] though no one need in fact be cheated.[4] Yet the intent is not necessarily, in truth, exactly this; but it must be an intent that the instrument forged shall be used as good. Consequently, —

Illustrations. — (**Take up — Pay — Enforce Payment — Just Claim — Intent inferred**). — If the man means to take up, for instance, the bill of exchange or promissory note when it becomes due, or even if he does take it up, so as to prevent any injury falling upon any person;[5] or, if one, while knowingly passing a forged bank-note, agrees to receive it again should it prove not to be genuine;[6] or, if a creditor executes a forgery of the debtor's name, to get from the proceeds payment of a sum of money due him;[7] or, if a party forges a deposition to be used in court, stating merely what is true, to enforce a just claim;[8] he commits the offence, the law inferring conclusively the intent to defraud. And, *a fortiori*, where no actual intent not to wrong any one absolutely exists, the law draws the conclusion of the intent to defraud whatever person may be defrauded, from the intent to pass as good.[9]

[1] Ante, § 521.

[2] Vol. I. § 729.

[3] Rex *v.* Jones, 2 East P. C. 991; United States *v.* Moses, 4 Wash. C. C. 726; The State *v.* Odel, 3 Brev. 552; Grafton Bank *v.* Flanders, 4 N. H. 239, 242; Rex *v.* Crocker, Russ. & Ry. 97; Reg. *v.* Tylney, 1 Den. C. C. 319; People *v.* Flanders, 18 Johns. 164; Rex *v.* Holden, 2 Taunt. 334; Brown *v.* Commonwealth, 2 Leigh, 769; Reg. *v.* Hodgson, 36 Eng. L. & Eq. 626, Dears. & B. 3.

[4] The State *v.* Pierce, 8 Iowa, 231.

[5] Reg. *v.* Geach, 9 Car. & P. 499; Reg. *v.* Hill, 2 Moody, 30; Reg. *v.* Beard, 8 Car. & P. 143; Reg. *v.* Forbes, 7 Car. & P. 224; Reg. *v.* Birkett, Russ. & Ry. 86; Reg. *v.* Hodgson, Dears. & B. 3, 36 Eng. L. & Eq. 626.

[6] Perdue *v.* The State, 2 Humph. 494. And see Vol. I. § 341; Rex *v.* Cushlan, Jebb, 113.

[7] Reg. *v.* Wilson, 2 Car. & K. 527, 1 Den. C. C. 284.

[8] The State *v.* Kimball, 50 Maine, 409.

[9] Reg. *v.* Beard, 8 Car. & P. 143, 148; Reg. *v.* Cooke, 8 Car. & P. 582; Reg. *v.* Hill, 8 Car. & P. 274; The State *v.* Wooderd, 20 Iowa, 541.

Either or both of two Persons. — Generally there are two persons who, legally, may be defrauded; the one whose name is forged, and the one to whom the forged instrument is to be passed; and so the indictment may lay the intent to defraud either of these, and proof of an actual intent to pass as good, though there be shown no actual intent to defraud the particular person, will sustain the allegation.[1]

§ 599. **Intent inferred, continued.** — The inference of intent to defraud cannot be drawn where, upon the proofs, the person named in the indictment could by no possibility in law be defrauded.[2] Thus, —

Security for Existing Debt. — If a forged deed is delivered to a person to secure a pre-existing debt, with no fresh consideration no fraud is in matter of law practised on this person, and an indictment cannot be maintained for uttering it with the intent to defraud him. "He was," said Perkins, J., "in no worse situation after taking the deed than before."[3]

No Person to be defrauded. — The English judges were divided upon the question, whether, in the absence of evidence of some one existing on whom the fraud could operate, in the case of a forged will, a count charging an intent to defraud a person unknown could be supported.[4] And under Stat. 14 & 15 Vict. c. 100, § 8, which provided, that, "it shall be sufficient in any indictment for forging, uttering, offering, disposing of, or putting off any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person; and, on the trial of any of the offences in this section mentioned, it shall not be necessary to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged, with an intent to defraud,"[5] — the opinion of the judges seemed to be, that the offence might be committed though there were no person in ex-

[1] Reg. *v.* Cooke, 8 Car. & P. 582; Rex *v.* Mazagora, Russ. & Ry. 291; Rex *v.* Hanson, 2 Moody, 245, Car. & M. 334; Rex *v.* Carter, 7 Car. & P. 134; Harris *v.* People, 9 Barb. 664; Brown *v.* Commonwealth, 2 Leigh, 769; The State *v.* Cleaveland, 6 Nev. 181; ante, § 543.

[2] Reg. *v.* Marcus, 2 Car. & K. 356 361; ante, § 543.

[3] Colvin *v.* The State, 11 Ind. 361 362, 363.

[4] Reg. *v.* Tylney, 1 Den. C. C. 319.

[5] Re-enacted, in slightly changed terms 24 & 25 Vict. c. 98, § 44.

istence on whom the fraud could operate.[1] But afterward, on full consideration, they decided that this statute concerns only the form of the indictment, not the law relating to the offence, which stands now as it stood before; there being, it seems, a necessity for some person to exist who can be defrauded.[2]

§ 600. **Reducing Sum due, &c.** — Hence if one is the owner of a bond or other like instrument on which money is payable to him, he does not commit forgery by altering it to reduce the sum, where no benefit results to himself or prejudice to another.[3] The offence was, however, committed, where one, having received another's accommodation acceptance for £1,000 at three months, brought it back, saying he could not get so large a bill discounted, and proposed a substitution of smaller bills; upon taking which he pretended to destroy the larger, in the presence of the other; but instead thereof altered it to a bill at twelve months.[4]

§ 601. **No Intent to put in Circulation.** — And if an engraving of a forged note is given to a person as a pattern or specimen of skill, without any intention of having it put in circulation, there is no uttering of forged paper.[5] So one does not become guilty of crime who writes another's name at his request.[6]

No Benefit or Injury meant. — And forging a letter, falsely representing persons to be partners, is not an offence either at the common law, or within the Kentucky statute, the words of which are, "any writing whatever whereby fraudulently to obtain the possession of, or to cause any person to be deprived of, any property whatever," — where the intent is not to have it used in a court of justice, or to get any pecuniary gain, or to inflict any injury.[7]

VII. *The Progress toward effecting the Fraud.*

§ 602. **Making alone.** — Forgery, though a substantive crime, partakes, as already observed, of the nature of attempt; and so

[1] Reg. v. Nash, 2 Den. C. C. 493, 12 Eng. L. & Eq. 578.

[2] Reg. v. Hodgson, Dears. & B. 3, 36 Eng. L. & Eq. 626; Vol. I. § 748.

[3] Blake v. Allen, Sir F. Moore, 619; Hammond on Forgery, parl. ed. p. 114, 115; 1 Hawk. P. C. Curw. ed. p. 264, § 4.

[4] Rex v. Atkinson, 7 Car. & P. 669.

[5] Rex v. Harris, 7 Car. & P. 428.

[6] Rex v. Parish, 8 Car. & P. 94; Rex v. Forbes, 7 Car. & P. 224; ante, § 572, 579.

[7] Jackson v. Weisiger, 2 B. Monr. 214. See Reg. v. Hodgson, 36 Eng. L. & Eq. 626, Dears. & B. 3.

the bare making of the false writing, with the evil intent, is alone sufficient.[1]

No Fraud accomplished. — No fraud need be actually perpetrated,[2] and there need be no uttering.[3]

§ 603. **No Credit gained.** — Upon this principle rests the doctrine already mentioned,[4] that it is immaterial whether any additional credit be gained by the forgery or not.[5] Also, —

Testator living. — It is no objection to holding a defendant criminally responsible for forging a will, that the supposed testator is living.[6]

Deed uncertain. — And a forgery with intent, &c., is sufficient within Stat. 5 Eliz. c. 14,[7] though of a deed of land in which the description of the premises is so uncertain that it could convey nothing if genuine.[8] This last-mentioned doctrine, however, runs close to the one already stated,[9] that there can be no forgery of an instrument legally invalid on its face; and at the present day it should not be received without a fresh examination.

Note without Indorsement. — Forging a note purporting to be payable to A or order is a complete offence, though there is no indorsement on it in A's name.[10]

VIII. *Offences depending on and growing out of Forgery.*

§ 604. **General View.** — We have considered, under another title, the general doctrine of cheats and attempts to cheat, at the common law.[11] And we have seen, that forgery is only a particular branch of the more comprehensive crime of cheat, actual or attempted.[12] In like manner, there are other branches in the na-

[1] Vol. I. § 572 and note; The State *v.* Holly, 2 Bay, 262; Commonwealth *v.* Ward, 2 Mass. 397.

[2] People *v.* Fitch, 1 Wend. 198; The State *v.* Humphreys, 10 Humph. 442; Rex *v.* Ward, 2 East P. C. 861; The State *v.* Washington, 1 Bay, 120.

[3] Commonwealth *v.* Ladd, 15 Mass. 526; Rex *v.* Crocker, 2 Leach, 4th ed. 987, 2 New Rep. 87, Russ. & Ry. 97; Rex *v.* Ward, 2 Ld. Raym. 1461.

[4] Ante, § 576, 583.

[5] Rex *v.* Marshall, Russ. & Ry. 75; Rex *v.* Taft, 1 Leach, 4th ed. 172, 2 East P. C. 959.

[6] Rex *v.* Sterling, 1 Leach, 4th ed. 99, 2 East P. C. 950; Rex *v.* Coogan, 1 Leach, 4th ed. 448, 2 East P. C. 948.

[7] Ante, § 550.

[8] Rex *v.* Crooke, 2 Stra. 901.

[9] Ante, § 538 et seq.

[10] Rex *v.* Hough, Bayley Bills, 6th ed. 586; Rex *v.* Birkett, Bayley Bills, 6th ed. 586. Compare with Williams *v.* The State, 51 Ga. 535.

[11] Ante, § 141 et seq.

[12] Vol. I. § 572; ante, § 148.

ture of forgery, but not forgery itself; and these other branches we are about to contemplate.

§ 605. **Uttering.** — According to principles before discussed in this volume, a cheat effected by a forged instrument is indictable at the common law as a substantive offence;[1] therefore an attempt to cheat by means of such an instrument is an indictable attempt.[2] This attempt is called in law an uttering.[3] Plainly, therefore, the offence of uttering is complete when the forged instrument is offered; it need not be accepted.[4] If a forged deed is put upon record as genuine, that is an uttering of it;[5] and so is the bringing of a suit upon a forged paper.[6] Of course, if the forged instrument is accepted by the person to whom it is offered, the offence is committed the same as though it were declined.[7] It is not necessary, as a foundation for the indictable uttering, that there should have been a previous forgery; as, if a person picks up a paper purporting to be a promissory note, which was in fact not meant to be a forgery, but was written by a boy as a trial of his skill at imitation, and passes it as good, believing it not to be, this is an indictable uttering.[8] But it is always an essential element in this offence that the person should know the instrument not to be genuine.[9]

Having. — For the reason that to constitute any crime there must be an act, as well as an intent, the mere *having* of a forged instrument, meaning to cheat therewith, does not suffice; but a receiving of it with the design so to use it, without actually using it, does.[10] And there are statutes, English and American, under which the having alone, with the intent to pass as good, is a crime.[11]

[1] Ante, § 148, 149.

[2] Ante, § 168, 441; Vol. I. § 437.

[3] Reg. v. Sharman, Dears. 285, 18 Jur. 157, 6 Cox C. C. 312, 24 Eng. L. & Eq. 586, overruling Reg. v. Boult, 2 Car. & K. 604. The American doctrine is the same. Commonwealth v. Searle, 2 Binn. 332. See Stat. Crimes, § 306.

[4] United States v. Nelson, 1 Abb. U. S. 135; People v. Caton, 25 Mich. 388, 392; Reg. v. Welch, 4 Cox C. C. 430; The State v. Horner, 48 Misso. 520.

[5] Paige v. People, 3 Abb. App. Dec. 439, 446; Perkins v. People, 27 Mich. 386.

[6] Chahoon v. Commonwealth, 20 Grat. 733.

[7] Reg. v. ———, 1 Cox C. C. 250; Reg v. Nisbett, 6 Cox C. C. 320.

[8] Reg. v. Dunlop, 15 U. C. Q. B. 118

[9] Wash v. Commonwealth, 16 Grat. 530; People v. Sloper, 1 Idaho Ter. 183; Chahoon v. Commonwealth, supra.

[10] Vol. I. § 204.

[11] See Vol. I. § 204; The State v. Benham, 7 Conn. 414; Commonwealth v. Cone, 2 Mass. 132; Commonwealth v. Whitmarsh, 4 Pick. 233; Sasser v. The State, 13 Ohio, 453, 483, 484; Spence v. The State, 8 Blackf. 281; Common-

§ 606. **Having, to render Current.** — Under the Massachusetts statute, which provides a punishment if any person shall have in his possession any counterfeit bank-bill "for the purpose of rendering the same current as true, or with intent to pass the same," the court held it sufficient to show an intent merely to pass the bill, without the further design to pass it as genuine, or for value. "One object of the statute may have been to prevent one dealer in forged paper from passing counterfeit notes to another, as false notes, to enable and assist him in defrauding others."[1]

§ 607. **Uttering, again.** — So there are statutes against uttering forged instruments. The legal meaning of the word "utter" was stated in "Statutory Crimes;" it is, in substance, "to offer."[2] And the intent must be such as has been already explained in this chapter.[3] Therefore, —

Giving in Charity. — The giving of a piece of counterfeit money in charity is not within Stat. 2 Will. 4, c. 34, § 7, though with knowledge of its being counterfeit; because there is no intent to defraud. For "although in the statute," said Lord Abinger, C. B., "there are no words with respect to defrauding, yet in the proof it is necessary, in my opinion, to go beyond the mere words of the statute, and to show an intention to defraud some person."[4]

Appearance of Wealth. — And the exhibiting to a man of a forged instrument, not to obtain his money, but merely to create in him false ideas of the wealth of the exhibitor, is not within the statute.[5]

wealth *v.* Morse, 2 Mass. 128; Commonwealth *v.* Houghton, 8 Mass. 107; Rex *v.* Rowley, Russ. & Ry. 110; Hopkins *v.* Commonwealth, 3 Met. 460; Stone *v.* The State, Spencer, 404; People *v.* Ah Sam, 41 Cal. 645; People *v.* White, 34 Cal. 183; Hutchins *v.* The State, 13 Ohio, 198; Commonwealth *v.* Price, 10 Gray, 472.

[1] Hopkins *v.* Commonwealth, 3 Met. 460; s. p. The State *v.* Harris, 5 Ire. 287. See Reg. *v.* Heywood, 2 Car. & K. 352; Bevington *v.* The State, 2 Ohio State, 160; Rex *v.* Giles, 1 Moody, 166; Hooper *v.* The State, 8 Humph. 93.

[2] Stat. Crimes, § 306. And see ante, § 605.

[3] Ante, § 596–601, 605. See also Hooper *v.* The State, 8 Humph. 93.

[4] Reg. *v.* Page, 8 Car. & P. 122. And see Stat. Crimes, § 232 et seq. See, however, Reg. *v.* Heywood, 2 Car & K. 352; Reg. *v.* ———, 1 Cox C. C. 250. The words of Stat. 2 Will. 4, c. 34, § 7, are, "tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for, any of the king's current gold or silver coin, knowing the same to be false or counterfeit," &c.

[5] Rex *v.* Shukard, Russ. & Ry. 200. And see further, as to the intent, Reg. *v.* Heywood, 2 Car. & K. 352; ante, § 596 et seq.

§ 608. **Putting off — Passing, &c.** — We have also statutes against "putting off,"[1] "passing,"[2] "showing forth in evidence,"[3] "selling and bartering,"[4] and the like.

IX. *Remaining and Connected Questions.*

§ 609. **Misdemeanor — Felony.** — At the common law, forgery is a misdemeanor; but most of the English statutes of forgery make the offence under them felony.[5] The rules by which we are to determine, whether or not a legislative act elevates to felony a crime which was misdemeanor, have been already sufficiently unfolded.[6] And the practitioner cannot fail to discern the importance of this question in each particular case; and of applying, in each case, those doctrines concerning principal, accessory, and the like, which were explained in the preceding volume.[7]

§ 610. **Punishment.** — The question of the punishment has been sufficiently considered.[8]

§ 611. **United States and States.** — Forgery is one of those crimes which, like counterfeiting the coin,[9] may be against the

[1] Stat. Crimes, § 307; Rex *v.* Giles, 1 Moody, 166; Bevington *v.* The State, 2 Ohio State, 160; Rex *v.* Palmer, Russ. & Ry. 72, 2 New Rep. 96, 2 Leach, 4th ed. 978.

[2] Stat. Crimes, § 308; Gentry *v.* The State, 3 Yerg. 451; The State *v.* Harris, 5 Ire. 287; Hooper *v.* The State, 8 Humph. 93; The State *v.* Fuller, 1 Bay, 245; Perdue *v.* The State, 2 Humph. 494.

[3] Stat. Crimes, § 309; The State *v.* Stanton, 1 Ire. 424; The State *v.* Britt, 3 Dev. 122.

[4] Bevington *v.* The State, 2 Ohio State, 160; Vanvalkenburg *v.* The State, 11 Ohio, 404; The State *v.* Fitzsimmons, 30 Misso. 236.

[5] 2 East P. C. 973, 1003; The State *v.* Cheek, 13 Ire. 114. And see Perdue *v.* The State, 2 Humph. 494; Hess *v.* The State, 5 Ohio, 5; The State *v.* Rowe, 8 Rich, 17; Lewis *v.* Commonwealth, 2 S. & R. 551; Commonwealth *v.* Ray, 3 Gray, 441.

[6] Vol. I. § 622.

[7] Vol. I. § 646–708. And see, for cases relating to forgery and counterfeiting, Rex *v.* Soares, Russ. & Ry. 25, 2 East P. C. 974; Rex *v.* Davis, Russ. & Ry. 113; Rex *v.* Badcock, Russ. & Ry. 249; Rex *v.* Bingley, Russ. & Ry. 446; Rex *v.* Kirkwood, 1 Moody, 304; Rex *v.* Dade, 1 Moody, 307; Rex *v.* Giles, 1 Moody, 166; Rex *v.* Stewart, Russ. & Ry. 363; Rex *v.* Hurse, 2 Moody & R. 360; Reg. *v.* Bannen, 2 Moody, 309, 1 Car. & K. 295; Reg. *v.* Clifford, 2 Car. & K. 202; Commonwealth *v.* Stevens, 10 Mass. 181; Reg. *v.* Barber, 1 Car. & K. 442; Reg. *v.* Harris, 7 Car. & P. 416; Rex *v.* Palmer, Russ. & Ry. 72, 2 New Rep. 96, 2 Leach, 4th ed. 978; The State *v.* Cheek, 13 Ire. 114; Rex *v.* Collicott, Russ. & Ry. 212, 4 Taunt. 300; Reg. *v.* Mazeau, 9 Car. & P. 676; Bothe's Case, Sir F. Moore, 666.

[8] Vol. I. § 927 et seq.; ante, § 55. And see as to forgery, The State *v.* Rowe, 8 Rich. 17; Lewis *v.* Commonwealth, 2 S. & R. 551.

[9] Ante, § 280–287.

government of the State, the government of the United States, or both.[1]

§ 612. **Forged Instrument as False Token.** — The reader has likewise been directed to the general doctrine, with its reasons and qualifications, that, if a forged instrument is used as a false pretence or false token, whereby a fraud is actually accomplished, the guilty person may be proceeded against, either for the cheat effected, or for the forgery, at the election of the prosecutor, when both offences are of one grade of crime, but not when one is a felony and the other a misdemeanor.[2]

[1] See United States *v.* Britton, 2 Mason, 464; The State *v.* Pitman, 1 Brev. 32; In re Truman, 44 Misso. 181; The State *v.* Brown, 2 Oregon, 221.

[2] Vol. I. § 787–789, 815; ante, § 165. And see Rex *v.* Evans, 5 Car. & P. 553; Reg. *v.* Button, 11 Q. B. 929; People *v.* Peacock, 6 Cow. 72; Hales's Case, 17 Howell St. Tr. 161, 209; Reg. *v.* Inder, 1 Den. C. C. 325; Reg. *v.* Anderson, 2 Moody & R. 469; Reg. *v.* Thorn, Car. & M. 206; Watson *v.* People, 64 Barb. 130.

For FORNICATION, see Stat. Crimes.
GAMING, see Stat. Crimes.
GAMING-HOUSE, see Vol. I. § 1135 et seq.
HAWKERS AND PEDDLERS, see Stat. Crimes.
HIGHWAY, see WAY.

CHAPTER XXIII.

HOMICIDE, FELONIOUS.[1]

§ 613–615. Introduction.
616–628. Historical View.
629–671. What Homicides are indictable.
672–722. What are Murder and what are Manslaughter.
723–730. What Murders are in First Degree and what in Second.
731. Degrees in Manslaughter.
732–738. Leading Doctrines of Indictable Homicide epitomized.
739–743. Attempts to commit Murder and Manslaughter.
744, 745. Remaining and Connected Questions.

§ 613. **Nature of the Subject — How treated of in the Books.** — The subject of the present chapter is one of great importance and wide extent in the criminal law. In the books it is not treated of so clearly as one might suppose it would be, considering how much the professional mind has had occasion to dwell upon it. But its proper treatment is attended with great difficulties; indeed, there are connected with it many questions, vital in their nature, upon which judicial opinion is not well settled, if indeed any opinion upon them has ever been pronounced.

§ 614. **How in this Chapter.** — The author, in this chapter, will endeavor to clear the subject of its difficulties, as far as the present condition of the law, which on some points is not quite settled, will permit. And, to do this, he will adopt methods which, at some places in the discussion, will differ more or less from those employed by preceding authors. In the first volume is a chapter entitled "Defence of Person and Property,"[2] wherein

[1] For matter relating to this title, see Vol. I. § 112–116, 131–134, 143, 148, 217, 227, 259, 305, 314, 316, 321, 328, 332, 334, 346, 348, 358, 361, 364, 401, 410, 414, 415, 429, 510, 511, 547, 557, 558, 562, 564, 635, 639, 640, 642, 652, 654, 666, 676, 678, 693, 698, 736, 781, 788, 792, 795, 797, 808, 811, 968, 1059. And see this volume, Duelling; Self-Murder. For the pleading, practice, and evidence, see Crim. Proced. II. § 495 et seq. Also, as to both law and procedure, Stat. Crimes, § 181, 185, note, 242, 371, 372, 465–477, 488, 502–508, 742, 743, 759, 761, note.

[2] Vol. I. § 836 et seq.

is inserted some matter which, but for that chapter, would be given here; and the reader should consult it in connection with the following elucidations.

§ 615. **How the Chapter divided.** — We shall consider, I. The History of the Doctrine of Indictable Homicide; II. What Homicides are indictable; III. What Indictable Homicides are Murder and what are Manslaughter; IV. What Murders are in the First Degree and what in the Second; V. Degrees in Manslaughter; VI. The Leading Doctrines of Indictable Homicide epitomized; VII. Attempts to commit Murder and Manslaughter with Various Forms of Felonious Assault; VIII. Remaining and Connected Questions.

I. *History of the Doctrine of Indictable Homicide.*

§ 616. **Obsolete Law.** — Connected with the history of the law of indictable homicide, there is much of mere curious learning, now obsolete, and of no value even for purposes of illustration. Of other obsolete law, it is important to know something. Thus, —

§ 617. *Old Homicides not Felonious:* —

Justifiable and Excusable. — In modern law, all homicides which are cognizable by the criminal courts are felonies. But anciently the law took jurisdiction of certain others as well as these. The homicide "which amounts not to felony," says Hawkins, "is either justifiable, and causes no forfeiture; or excusable, and causes the forfeiture of the party's goods."[1] But we saw, in the first volume,[2] that forfeitures of this sort are unknown in our States. Whence it has followed, that any homicide which, under the old law, was less than felony, is simply regarded as no offence with us.

§ 618. **Three kinds.** — Blackstone says: "Homicide is of three kinds, — justifiable, excusable, and felonious. The first has no share of guilt at all; the second, very little; but the third is the highest crime against the law of nature that man is capable of committing."

§ 619. **Justifiable Homicide explained.** — And he divides justifiable homicide into two classes: "1. Such as is owing to some

[1] 1 Hawk. P. C. Curw. ed. p. 79.

[2] Vol. I. § 970

unavoidable *necessity*, without any will, intention, or desire, and without any inadvertence or negligence, in the party killing; and, therefore, without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the execution of public justice, to put a malefactor to death, who had forfeited his life by the laws and verdict of his country. . . . But the law must *require* it, otherwise it is not justifiable; therefore wantonly to kill the greatest of malefactors, a felon or a traitor attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder.[1] . . . 2. Homicide committed for the advancement of *public justice*,"[2] in cases where the act is not commanded, but permitted. And here he mentions, by way of illustration, such homicides as are committed in the prevention of a felony;[3] in the arrest of persons guilty, or accused, of crime;[4] in preventing escapes, or retaking the criminal;[5] in the suppression of breaches of the peace.[6]

§ 620. **Excusable Homicide explained — Misadventure.** — Excusable homicide he divides as follows: "1. Homicide *per infortunium*, or *misadventure*, where a man, doing a lawful act, without an intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off, and kills a stander-by; or where a person qualified to keep a gun is shooting at a mark, and undesignedly kills a man; for the act is lawful, and the effect is merely accidental. So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal [of course this must be in a case where the officer has this right, as probably no officer in this country has, except keepers of prisons and the like], and happens to occasion his death, it is only misadventure: for the act of correction is lawful: but, if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder; for the act of immoderate correction is unlawful. . . . A tilt or tournament, the martial diversion of our ancestors, was, however, an unlawful act; and so are boxing and sword-playing, the succeeding amusement of their posterity; and, therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony,

[1] And see post, § 630, 644.
[2] 4 Bl. Com. 178, 179.
[3] Vol. I. § 849.
[4] Post, § 647.
[5] Post, § 647–651.
[6] Post, § 647 et seq., 653, 654.

or manslaughter. But if the knight command or permit such diversion, it is said to be only misadventure; for then the act is lawful. . . . Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful; but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness, of inevitably dangerous consequence. And, in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing, in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts." [1]

§ 621. **Continued — Self-defence.** — The second species of excusable homicide, mentioned by Blackstone, is "homicide in self-defence, or *se defendendo*," — the same which was somewhat treated of in the first volume.[2] He says: "The self-defence which we are now speaking of, is that whereby a man may protect himself from an assault or the like, in the course of a sudden broil or quarrel, by killing him who assaults him. And this is what the law expresses by the word *chance-medley*,[3] or (as some rather choose to write it) *chaud-medley*, the former of which in its etymology signifies a *casual* affray, the latter an affray in the *heat* of blood or passion; both of them of pretty much the same import; but the former is in common speech too often erroneously applied to any manner of homicide or misadventure; whereas it appears by the Statute 24 Hen. 8, c. 5, and our ancient books, that it is properly applied to such killing as happens in self-defence upon a sudden rencounter." [4]

§ 622. **How punished.** — The two species of excusable homicide appear to stand on equal ground together, as concerns the only material thing which distinguishes excusable from justifiable homicide in the ancient law of England. The excusable was subject to punishment, as explained by Blackstone in the following words: "The penalty inflicted by our laws is said by Sir Edward Coke to have been anciently no less than death; which, however, is with reason denied by later and more accurate writers. It seems rather to have consisted in a forfeiture, some say of all the goods

[1] 4 Bl. Com. 182, 183.
[2] Vol. I. § 836 et seq.
[3] See, for various views of *chance-medley*, Foster, 258. And see 3 Inst. 57; 1 Hale, P. C. 471 et seq.
[4] 4 Bl. Com. 183, 184.

and chattels, others of only part of them, by way of fine or *weregild;* which was probably disposed of, as in France, *in pios usus*, according to the humane superstition of the times, for the benefit of *his* soul who was thus suddenly sent to his account, with all his imperfections on his head. But that reason having long ceased, and the penalty (especially if a total forfeiture) growing more severe than was intended, in proportion as personal property has become more considerable, the delinquent has now, and has had, as early as our records will reach, a pardon and writ of restitution of his goods as a matter of course and right, only paying for suing out the same. And, indeed, to prevent this expense, in cases where the death has notoriously happened by misadventure or in self-defence, the judges will usually permit (if not direct) a general verdict of acquittal." [1]

Present Law. — Since Blackstone wrote, the law of England has quite done away with this forfeiture, even if we should admit that it was not practically abrogated before. And there is no remnant of this barbarous superstition clinging to the jurisprudence of our own country.[2]

§ 623. *Division of Felonious Homicides into the Two Degrees now known as Murder and Manslaughter:* —

Ancient Idea of Murder — Voluntary Homicide — Charging the Hundred. — In Britton we have the following: "Murder is the felonious killing of a person unknown, whereof it cannot be known by whom it was done. And our will is, that for every murder the hundred in which it shall be committed be amerced; and, if the fact is found to have been done in two hundreds, let both the hundreds be amerced in proportion to the extent of each hundred. And it shall not be adjudged murder where any of the kin of the deceased can be found, who can prove that he was an Englishman, and thus make presentment of Englishery;[3] nor, although the person killed was a foreigner, if he lived long enough to accuse the felons himself; nor where any felon shall be apprehended for the fact; nor in case of accident or mischance; nor where any man shall have taken sanctuary for the felony; nor in any case where the felon shall be known, so that the felony may be punished by outlawry, or otherwise attainted;

[1] 4 Bl. Com. 188. And see Foster, 279 et seq.; 3 Inst. 57.

[2] See ante, § 617.

[3] Spelled in the old books, *Englishery, Englescherie, Englecery*, &c.

nor where two or more persons have feloniously killed each other, although they be unknown, or aliens."[1] This old law, by which the hundred was to be amerced in certain cases of secret killing, was "introduced," says Hawkins, "by King Canute for the preservation of his Danes, . . . unless they could prove that the person slain were an Englishman (which proof was called Englishery), or could produce the offender, &c. And in those days the open wilful killing of a man through anger or malice, &c., was not called murder, but voluntary homicide."[2]

§ 624. **Responsibility of the Hundred abolished.** — But, in the year 1340, this responsibility of the hundred was taken away by a statute which provided, "that from henceforth no justice errant shall put in any article, opposition, presentment of Englishery, against the commons of the counties, nor against any of them, but that Englishery, and the presentment of the same, be wholly out and void for ever, so that no person by this cause may be from henceforth impeached."[3] It is seen, therefore, that, at this time, there ceased to be, in the law, any offence to which the term murder could be applied.

Altered Meaning of "Murder" — Statutes. — Consequently, as Hawkins observes, "the killing of any Englishman or foreigner through malice prepense, whether committed openly or secretly, was by degrees called murder; and 13 Rich. 2 [stat. 2], c. 1, which restrains the king's pardon in certain cases, does in the preamble, under the general name of murder, include all such homicides as shall not be pardoned without special words; and,

[1] Brit. b. 1, c. 7; Nichols's Translation, Vol. I. p. 38.

[2] 1 Hawk. P. C. Curw. ed. p. 91, § 1. Blackstone explains as follows: "The name of murder (as a crime) was anciently applied only to the secret killing of another (which the word *moerda* signifies in the Teutonic language); and it was defined *homicidium quod nullo vidente, nullo sciente, clam perpetratur;* for which the vill wherein it was committed, or (if that were too poor) the whole hundred was liable to a heavy amercement; which amercement itself was also denominated *murdrum.* This was an ancient usage among the Goths in Sweden and Denmark; who supposed the neighborhood, unless they produced the murderer, to have perpetrated, or, at least, connived at, the murder; and, according to Bracton, was introduced into this kingdom by King Canute, to prevent his countrymen the Danes from being privily murdered by the English; and was afterwards continued by William the Conqueror, for the like security of his own Normans. **Englishery.** — And therefore if, upon inquisition had, it appeared that the person found slain was an Englishman (the presentment whereof was denominated *englescherie*), the country seems to have been excused from this burden." 4 Bl. Com. 194, 195. See, also, Lord Coke in Calvin's Case, 7 Co. 1, 16.

[3] Stat. 14 Edw. 3, stat. 1, c. 4.

in the body of the act, expresses the same by 'murder, or killing by await, assault, or malice prepensed?' And doubtless the makers of 23 Hen. 8, c. 1, which excluded all wilful murder of malice prepense from the benefit of the clergy, intended to include open, as well as private, homicide within the word murder."[1]

§ 625. **Taking away Clergy.** — From what was said in the first volume[2] respecting the benefit of clergy, the reader perceives, that a felony, where clergy was allowed, was practically almost no offence whatever. Therefore, —

"Malice Aforethought" — Present Meaning of "Murder" — Manslaughter. — When the latter of the two statutes mentioned by Hawkins, namely, 23 Hen. 8, c. 1, § 3, provided, "that no person or persons which hereafter shall happen to be found guilty, &c., for any wilful murder of malice prepensed, &c., shall from henceforth be admitted to the benefit of his or their clergy, but utterly be excluded thereof, and shall suffer death," &c., it created, in substance, a new offence. And as the term murder was before of uncertain meaning, it was thereafter applied to what was thus excluded from clergy, signifying neither more nor less. And the term manslaughter, or sometimes chance-medley, was used to designate all other kinds of felonious homicide.

§ 626. **New Meanings, continued — Course of the Law's Development.** — Yet Mr. Reeves has shown, that, even after the passage of this statute, the terms of the law, and the law itself, were practically somewhat slow in assuming their present shape.[3] It is not necessary to trace the history here; the reader will find it sufficiently stated elsewhere.[4]

§ 627. **Felonious Killing.** — The reader perceives, therefore, that we come to the following result: To ascertain what is a felonious homicide, this expression including both murder and manslaughter, we look to the common law of England and this country, substantially as unaffected by statutory provisions, English or American. But, —

Murder distinguished from Manslaughter. — When we inquire what is murder as distinguished from manslaughter, we find the

[1] 1 Hawk. P. C. Curw. ed. p. 91, § 2.
[2] Vol. I. § 936 et seq.
[3] 4 Reeves Hist. Eng. Law, 893, 534 et seq.
[4] See, also, for a discussion of this subject, Crim. Proced. II. § 498–501, 544–546, 548.

whole in Stat. 23 Hen. 8, c. 1, § 3; the words being "wilful murder [that is, remembering what the word murder meant at the time when this statute was framed, wilful felonious killing] of malice prepensed."

§ 628. **Modern Doctrine of Murder.** — But the phrase "wilful felonious killing of malice prepensed" is, in its nature, one which requires judicial exposition to be understood. And out of such exposition has grown the modern doctrine of murder. The author, in the preceding volume,[1] stated what is the general meaning of the two words "wilful" and "malice;" but, in what follows, will be shown the results to which judicial interpretation has conducted the law of murder; leading it, if the expression may be understood, *out of* the three words "wilful," "malice," and "prepensed," rather than *into* any meaning which any one of these words has within itself. But, before this exposition will be in order, we shall, in the next sub-title, inquire, —

II. *What Homicides are indictable.*

§ 629. **General View.** — The topic of this sub-title does not admit of condensation into one comprehensive statement, which shall include the whole doctrine. The law has always cherished the life of the subject, and has visited with punishment every act by which it has been taken away, provided the act was of a certain standard of culpability. But there is no one rule by which the culpability can be measured. We shall, therefore, travel through the facts of cases to see to what point, under the various circumstances of life-taking, the law's standard reaches. But as preliminary to this, we must inquire as to —

§ 630. *The Being on whom the Homicide is committed:* —

Every Human Being. — The doctrine is, that every human being who is, according to the old English phrase, in the peace of the king, by which is meant, in the enjoyment of the right of existence at the particular time and place, may be the subject of felonious homicide;[2] "as," says Lord Coke, "man, woman, child, subject born, or alien, persons outlawed, or otherwise attainted

[1] Vol. I. § 427–429.

[2] Vol. I. § 134; 1 Hawk. P. C. Curw. ed. p. 94, § 15; 1 Hale P. C. 433; 4 Bl. Com. 198; Rex *v.* Depardo, 1 Taunt. 26, Russ. & Ry. 134; Rex *v.* Helsham, 4 Car. & P. 394.

of treason, felony, or premunire, Christian, Jew, Heathen, Turk, or other Infidel, being under the king's peace." [1]

§ 631. **Enemy in Battle.** — But we have seen,[2] that a homicide committed in the actual heat of battle in time of war is not criminal; [3] for the person killed had not, at the moment and in the place, a right to his life, if the other could take it away.

Unlawful Execution. — Even where the right of life does not exist, this fact is no justification to one extinguishing it otherwise than according to law. Therefore, says Lord Hale, "if a person be condemned to be hanged, and the sheriff behead him, this is murder." [4] And the same is true if any person not authorized executes the sentence of death.[5]

Enemy not in Battle. — So if one maliciously kills an alien enemy, not in the exercise of war, it is murder.[6]

§ 632. **Child Unborn — Fully Born.** — But a child within its mother's womb is not a being on whom a felonious homicide can be committed; it must be born,[7] every part of it must have come from the mother.[8] Yet the umbilical cord, which attaches it to her, need not be separated; [9] neither need the child have breathed, if otherwise it had life and an independent circulation; [10] while, on the other hand, supposing it to have breathed before being fully born, and then death to have ensued by natural means before the delivery was complete, it could not be the subject of this offence.[11]

§ 633. **Premature Birth.** — If the child is born alive, it is of no consequence that the full period of gestation had not elapsed. Therefore, —

Death following Abortion. — Where a person intending to procure an abortion does an act which causes the child to be born before the natural time, and consequently less capable of living, whereby

[1] 3 Inst. 50. And see Pennsylvania *v.* Robertson, Addison, 246.

[2] Vol. I. § 131, 134.

[3] 1 Hale P. C. 433.

[4] 1 Hale P. C. 433.

[5] 1 Hawk. P. C. Curw. ed. p. 80, § 9. And see post, § 644.

[6] Vol. I. § 134; The State *v.* Gut, 13 Minn. 341.

[7] Rex *v.* Brain, 6 Car. & P. 349.

[8] Rex *v.* Brain, supra; Rex *v.* Crutchley, 7 Car. & P. 814; Rex *v.* Sellis, 7 Car. & P. 850; Rex *v.* Poulton, 5 Car. & P. 329.

[9] Rex *v.* Reeves, 9 Car. & P. 25; Reg. *v.* Trilloe, Car. & M. 650, 2 Moody, 260. And see Rex *v.* Crutchley, 7 Car. & P. 814.

[10] Rex *v.* Brain, supra.

[11] Rex *v.* Sellis, 7 Car. & P. 850; Rex *v.* Enoch, 5 Car. & P. 539; Rex *v.* Poulton, 5 Car. & P. 329. See also 3 Greenl. Ev. § 136.

it dies after birth from this premature exposure, he is guilty of murder.[1] But, —

Life taken before Birth. — Where a woman sunders the head from her infant's body before the birth is complete, she escapes the condemnation of the law for this aggravated crime.[2] Lord Coke says: "If a woman be quick with child; and by a potion or otherwise killeth it in her womb; or, if a man beat her, whereby the child dieth in her body, and she is delivered of a dead child, this is a great misprision, and no murder; but, —

Death after from Injury before. — "If the child be born alive, and dieth of the potion, battery, or other cause, this is murder."[3]

§ 634. **Counselling Mother before Birth.** — And if one counsels, before birth, a mother to kill her infant after birth, and she does it, he becomes thereby an accessory before the fact to her act of murder.[4]

§ 635. *The Killing:* —

What it is to Kill another. — Hawkins puts the question, "in what cases a man may be said to kill another," and proceeds: "Not only he who by a wound or blow, or by poisoning, strangling, or famishing, &c., directly causes another's death; but also, in many cases, he who by wilfully and deliberately doing a thing which apparently endangers another's life, thereby occasions his death; shall be adjudged to kill him. And such was the case of him who carried his sick father, against his will, in a cold, frosty season, from one town to another, by reason whereof he died. Such also was the case of the harlot, who, being delivered of a child, left it in an orchard, covered only with leaves, in which condition it was struck by a kite, and died thereof. And in some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another, or by himself; as where one by duress or imprisonment compels a man to accuse an innocent person, who on his evidence is condemned and executed; or where one incites a madman to kill himself or another; or where one lays poison with an intent to kill one man, which is afterwards accidentally taken by another, who dies thereof. Also he who wilfully neglects to prevent a mischief,

[1] Reg. *v.* West, 2 Car. & K. 784. And see Rex *v.* Senior, 1 Moody, 346.

[2] Rex *v.* Sellis, 7 Car. & P. 850.

[3] 3 Inst. 50; s. p. 1 Hale P. C. 433.

[4] Parker's Case, 2 Dy. 186, pl. 2; 3 Inst. 51; 1 Hale P. C. 433; Vol. I. § 676. See post, § 744.

which he may and ought to provide against, is, as some have said, in judgment of the law, the actual cause of the damage which ensues; and, therefore, if a man have an ox or a horse, which he knows to be mischievous, by being used to gore or strike at those who come near them, and do not tie them up, but leave them to their liberty, and they afterwards kill a man, according to some opinions the owner may be indicted as having himself feloniously killed him; and this is agreeable to the Mosaical law. However, as it is agreed by all, such a person is certainly guilty of a very gross misdemeanor."[1]

§ 636. **In Short — Foregoing Illustrations.** — This extract from Hawkins shows, that, as a general proposition, he whose act causes, in any way, directly or indirectly, the death of another, kills him, within the meaning of the law of felonious homicide. Yet there may be doubt concerning one or two of the instances mentioned by Hawkins in illustration of the proposition. Thus it is doubtful, as we saw in the first volume,[2] whether, in law, it is a killing, or, at least, whether the killing is felonious, where one, by perjury before the grand jury, or before the petit jury, causes another to be capitally convicted, by reason of which the latter is executed in a legal way.

§ 637. **Offender's Conduct and other things combining.** — It is a general rule both of law and reason, that, when a man's will contributes to impel a physical force, whether such force proceed directly from another, or from another and himself, he is to be held responsible for the result, the same as if his own unaided hand had produced it.[3] The contribution, however, must be of such magnitude, and so near the result, that, sustaining to it the relation of contributory cause to effect, the law takes it within its cognizance.[4] Now these propositions conduct us to the doctrine, that, whenever a blow is inflicted under circumstances to render the party inflicting it criminally responsible if death follows, he will be deemed guilty of the homicide though the person beaten would have died from other causes, or would not have died from this one had not others operated with it; provided the blow

[1] 1 Hawk. P. C. Curw. ed. p. 92, § 4–8.

[2] Vol. I. § 564.

[3] See Vol. I. § 628 et seq.; Reg. *v.* Haines, 2 Car. & K. 368; 1 Hale P. C. 428.

[4] See Vol. I. § 212 et seq., 406, 630–633; ante, § 433; post, § 668.

really contributed either mediately or immediately to the death, in a degree sufficient for the law's notice.[1] Thus, —

§ 638. **Wounded Person's own Neglect.** — In an old case "it was resolved, that, if one gives wounds to another, who neglects the cure of them, or is disorderly and doth not keep that rule which a person wounded should do, yet if he die it is murder or manslaughter, according as the case is; . . . because, if the wounds had not been, the man had not died; and therefore neglect or disorder in the person who received the wounds shall not excuse the person who gave them."[2] And the doctrine is established, that, if the blow caused the death, it is sufficient, though the individual might have recovered had he used proper care himself;[3] or submitted to a surgical operation, to which he refused submission;[4] or had the surgeons treated the wound properly.[5] So, also, —

Prior Cause. — If the person would have died from some other cause already operating, yet if the wound hastened the termination of life, this is enough;[6] as, for example, if he had already been mortally wounded by another.[7] And if the person attacked was enfeebled by disease, and what was done would not have been mortal to a well person, still, if the assaulting person knew his condition and did what was mortal to him, the offence is committed.[8]

§ 639. **Wound not Mortal.** — But where the wound is not of itself mortal, and the party dies in consequence solely of the improper treatment, not at all of the wound, the result is otherwise.[9] And it is the same if the wounded person becomes sick

[1] And see post, § 641; Commonwealth *v.* Fox, 7 Gray, 585; Williams *v.* The State, 2 Texas Ap. 271; Kee *v.* The State, 28 Ark. 155; Kelley *v.* The State, 53 Ind. 311.

[2] Rex *v.* Rew, J. Kel. 26; Bowles *v.* The State, 58 Ala. 335.

[3] 1 Hawk. P. C. Curw. ed. p. 93, § 10; McAllister *v.* The State, 17 Ala. 434; The State *v.* Bantley, 44 Conn. 537.

[4] Reg. *v.* Holland, 2 Moody & R. 351. And see Reg. *v.* West, 2 Car. & K. 784.

[5] The State *v.* Baker, 1 Jones, N. C. 267; Commonwealth *v.* Hackett, 2 Allen, 136; Brown *v.* The State, 38 Texas, 482; People *v.* Cook, 39 Mich. 236. And see Reg. *v.* Haines, 2 Car. & K. 368.

[6] 1 Hale P. C. 428; The State *v.* Morea, 2 Ala. 275.

[7] People *v.* Ah Fat, 48 Cal. 61.

[8] Commonwealth *v.* Fox, 7 Gray, 585.

[9] 3 Greenl. Ev. § 139; 1 Hale P. C. 428; Reg. *v.* Connor, 2 Car. & K. 518; Parsons *v.* The State, 21 Ala. 300. In this last case the distinction is stated, perhaps in part too favorably to defendants, to be that "ordinarily," if the wound is "not dangerous in itself, and the death was evidently occasioned by the grossly erroneous treatment, the original author will not be accountable. . . . If the wound was mortal or dangerous, the person who inflicted it cannot shelter himself under the plea of erroneous treatment."

and dies of an independent disease, not connected with the wound, which was not mortal.[1]

Not alone Mortal, but a Part Cause. — But we should not suffer these propositions to carry us too far; because, in law, if the person dies by the action of the wound, and by the medical or surgical action, jointly, the wound must clearly be regarded sufficiently a cause of the death.[2] And the wound need not even be a concurrent cause; much less need it be the next proximate one; for, if it is the cause of the cause, no more is required.[3]

[1] Livingston *v.* Commonwealth, 14 Grat. 592; Daniel, J., observing: "The blow is neither the proximate cause of the death, nor is it, though made by extraneous circumstances to accelerate it, linked with it in the regular chain of causes and consequences. A new and wholly independent instrumentality is interposed in the shape of the disease; and, in contemplation of law, the death-stroke is inflicted by the hand of Providence, and not by the hand of violence." p. 602.

[2] Ante, § 637.

[3] Lord Hale says: "If a man receives a wound which is not in itself mortal, but, either for want of helpful applications, or [from] neglect thereof, it turns to a gangrene or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound though it were not the immediate cause of his death, yet if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*." 1 Hale P. C. 428. And see Commonwealth *v.* McPike, 3 Cush. 181; Reg. *v.* Minnock, 1 Crawf. & Dix C. C. 45. In a Massachusetts case the court held, that, where the wound is feloniously inflicted, and the unskilfulness of the surgeon contributes to the death which follows, the person inflicting the wound is, nevertheless, guilty of murder or manslaughter, as the case may be. And Bigelow, C. J., after reviewing the authorities, which he considered to be all one way, said: "The well-established rule of the common law would seem to be, that, if the wound was a dangerous wound, that is, calculated to endanger or destroy life, and death ensued therefrom, it is sufficient proof of the offence of murder or manslaughter; and that the person who inflicted it is responsible, though it may appear that the deceased might have recovered if he had taken proper care of himself, or submitted to a surgical operation, or that unskilful or improper treatment aggravated the wound and contributed to the death, or that death was immediately caused by a surgical operation rendered necessary by the condition of the wound." Commonwealth *v.* Hackett, 2 Allen, 136, 141. According to a Louisiana case, the jury, to justify a conviction, must be satisfied that the deceased died of the wounds, and from no other cause. The fact that he had no surgeon, or an unskilful one, or a nurse whose ill appliances aggravated the original wounds, cannot mitigate the crime. To do that, it must plainly appear that the death was caused, not by the wound, but only by misconduct, malpractice, or ill-treatment, on the part of other persons than the accused. The State *v.* Scott, 12 La. An. 274. Where, in North Carolina, the judge charged the jury, that, if one inflicts a mortal wound, and, while the wounded person is languishing, another kills him by an independent act, the former is guilty of murder, this was held to be error. "We cannot imagine," said Battle, J., "how the first can be said to have killed him, without involving the absurdity of saying that the deceased was killed twice." The State *v.* Scates, 5 Jones, N. C. 420, 423.

§ 640. **The Time of Death.** — The death must take place within a year and a day from the time when the wound or other injury was inflicted.[1] "In the computation whereof," says Hawkins, "the whole day on which the hurt was done shall be reckoned the first;[2] so that, if the stroke is on the first day of January, and the death is on the first day of the January next following, the offence is committed; but not, if the death is on the second day of the second January. Fractions of a day are not regarded;[3] consequently it makes no difference whether the stroke or death is in the morning or afternoon.[4]

§ 641. **The Kinds of Force producing Death.** — We have seen,[5] in general, that it is immaterial as respects responsibility for the killing, by what sort of force death is produced; as, whether it proceeds from the action of the mind or the body;[6] whether it operated solely, or concurrently with other things;[7] whether it was consented to by the person on whom it operated, or not;[8] whether it was a blow,[9] or a drug,[10] or an instrument or other thing used to procure abortion,[11] or a command addressed to an inferior under obligation to obey,[12] or an unlawful confinement,[13] or a leaving of a dependent person in a place of exposure,[14] or any omission of a duty which the law enjoins,[15] or a ball discharged from a gun;[16] whether it was accompanied by acts of other persons concurring in what was done, or operated alone;[17] or was of any other nature.[18] How a false charge of a crime punishable with death, supported by a false oath, is to be regarded, was considered in the first volume,[19] and mentioned in a preceding section.[20]

[1] The State *v.* Orrell, 1 Dev. 139.

[2] 1 Hawk. P. C. Curw. ed. p. 93, § 9.

[3] Stat. Crimes, § 28, 29.

[4] 3 Inst. 53.

[5] Ante, § 635, 636.

[6] See, on this point, Vol. I. § 560, 564; Reg. *v.* Pitts, Car. & M. 284; 1 East P. C. 225; 3 Greenl. Ev. § 142.

[7] See Vol. I. § 337, 339, 630; ante, § 637, 638.

[8] Vol. I. § 257–263; Commonwealth *v.* Parker, 9 Met. 263, 265.

[9] Shorter *v.* People, 2 Comst. 193; Grey's Case, J. Kel. 64; s. c. nom. Gray's Case, J. Kel. 133; Keat's Case, Skin. 666.

[10] Rex *v.* Martin, 3 Car. & P. 211; Gore's Case, 9 Co. 81 *a*; Ann *v.* The State, 11 Humph. 159.

[11] Commonwealth *v.* Keeper of the Prison, 2 Ashm. 227; Reg. *v.* West, 2 Car. & K. 784; Commonwealth *v.* Parker, 9 Met. 263, 265; post, § 657, 691.

[12] Vol. I. § 562; United States *v.* Freeman, 4 Mason, 505.

[13] Reg. *v.* Marriott, 8 Car. & P. 425.

[14] Beal's Case, 1 Leon. 327.

[15] Vol. I. § 314; Reg. *v.* Shepherd, Leigh & C. 147; Reg. *v.* Dant, Leigh & C. 567; Reg. *v.* Smith, Leigh & C. 607.

[16] The State *v.* Sisson, 3 Brev. 58.

[17] Vol. I. § 630.

[18] And see Chichester's Case, Aleyn, 12.

[19] Vol. I. § 564.

[20] Ante, § 635.

§ 642. *General Considerations to show whether a Particular Homicide is indictable or not:* —

Lawful Force. — It is a plain proposition, that, if death ensues from the employment of a force in no way unlawful, this does not subject to indictment the person causing the death.

Unlawful. — The force must be unlawful; but, in what sense and to what extent unlawful, it is impossible to state by any single rule. The reader should here trace the line of the law through numerous cases, and various principles interspersed among the sections of our first volume. Yet a reference to some cases in this connection may be helpful, both as placing before him certain landmarks of doctrine, and indicating in a general way how the lines run. As in conspiracy[1] the "unlawful" thing contemplated to be done need not be "indictable" on other grounds, so here it is believed that what is done may be sufficient though of a nature not punishable as crime when no injury follows the doing. Doubtless, in most cases, if death does not occur where the homicide would be indictable if it did, yet the person suffers an injury, the wrong-doer is liable for an assault and battery; still it is believed that this proposition does not constitute a universal rule.

§ 643. **Illustrations of "Unlawful."** — As showing that there must be something unlawful, —

Neglect to employ Midwife. — Where a girl eighteen years old was taken in labor at the house of her stepfather during his absence, and the mother omitted to procure for her the services of a midwife, yet there was no evidence of the mother's having the means to pay for the services, but from the want of them the girl died, the court held that this mother was not legally bound, under the circumstances, to procure a midwife; and, therefore, she could not be convicted of manslaughter.[2] Yet, in

[1] Ante, § 178, 181.

[2] Reg. *v.* Shepherd, Leigh & C. 147. Erle, C. J., in delivering the opinion of the judges, said: "It is important that the boundaries of crime should be well defined. They are not so definite as they might be in cases of negligence; and our duty is to consider and see, whether there are any facts here to bring this case within the principle of any of the cases where the omission of a duty resulting in death has been held to be manslaughter. The facts of the case are, that the prisoner did not procure the aid of a midwife for her daughter during child-birth. In consequence of her omitting to do so, a difficulty occurred, and death ensued. Was there a breach of duty for which she would be responsible in a criminal court in not obtaining that aid? We must take it, that, if she had used ordinary care, she would have procured the

this case, if the law had cast on the mother a duty, and she had possessed the ability to perform it, she would have been adjudged guilty of an indictable homicide.[1] In the eye of morality, the duty was upon her, and practically she had the means of discharging it, therefore we hold her to be morally guilty. But if, in morals, as in law, she had been under no duty and possessed no means, she would be deemed not to be even morally respon-

attendance of a midwife; that she knew where a midwife could be found; and that, if the midwife had been summoned, she would have attended. Of course, her skill must have been paid for; and there is no evidence that the woman had the means at her command of paying for that skill. The midwife would probably have attended without being paid. Yet the prisoner cannot be criminally responsible for not asking for that aid, which, perhaps, might have been given without compensation. Aid of this kind is not always required in child-birth; and sometimes no ill consequences result from its absence. Here, however, it was wanted, and was not applied. These facts do not seem to me to fall within the principle of any of the cases that have been cited. The cases where the person, whose death is caused, has been brought into circumstances where he cannot help himself, as by imprisonment by the act of the party charged, are clearly distinguishable. There the persons imprisoned are helpless, and their custodians, by the fact of their being so, have charged themselves with the support of their prisoners. The case of parent and child of tender years is also distinguishable, as are the other cases where such a duty is imposed by law or contract, as in the case of master and apprentice. Here the girl was beyond the age of childhood, and was entirely emancipated. Then, being in the prisoner's house, she is brought to bed, and the mother omits to procure her a midwife. I cannot find any authority for saying, that that was such a breach of duty as renders her, in the event which ensued, liable to the consequences of manslaughter." And Williams, J., observed: "No doubt, the prisoner is morally guilty; but legally she is not punishable." p. 154–156.

Neglect to supply Food to Servant.— In a later case it was held, that a mistress is not criminally responsible for the death of her servant, caused by neglecting to supply the servant with proper food and clothing, unless the latter is helpless and unable to take care of herself, or so under the control of the former as to be unable to withdraw herself therefrom. Said Erle, C. J.: "The law clearly is, that, if a person has the custody and charge of another, and neglects to supply proper food and lodging, such person is responsible, if from such neglect death results to the person in custody; but it is also equally clear, that, when a person having the free control of her actions, and able to take care of herself, remains in a service where she is starved and badly lodged, the mistress is not criminally responsible for any consequences that may ensue." Reg. *v.* Smith, Leigh & C. 607, 624, 625. I do not propose to question the correctness of this decision, but the latter half of the sentence quoted from the learned Chief Justice may convey an erroneous idea to a reader not on his guard. If a girl wishing to end her life, should go to a mistress accustomed to starve and ill-lodge her servants, and the mistress should employ the girl knowing of this wish, and should rigorously carry out her usual course with an express view to fatal consequences, every lawyer would hold her to be guilty of murder, the same as though she had stabbed the servant at the servant's request. Now, assuming the above real case to be decided correctly, where is the line dividing it from the one just supposed?

[1] See the last note.

sible. This question of neglect is discussed in our first volume,[1] and in various places in the present chapter.[2]

§ 644. **Official Duty.** — There are circumstances in which the taking of human life is one of the high duties cast upon official persons in respect of their offices. And though the duty is not to be sought, yet its performance, like that of all other duties, is truly commendable; it should never be made ground of reproach.[3] Of course, in all these circumstances, the force which caused the death was not unlawful.

§ 645. **Resisting Felony.** — Again, it is lawful to resist to death one who is attempting to commit a felony; therefore a person making such lawful resistance — in other words, doing nothing unlawful — is not punishable though he takes the felon's life.[4]

Self-defence. — And the same is true when one causes death in the lawful exercise of his right of self-defence.[5]

§ 646. **Making Arrests.** — In "Criminal Procedure," the right and duty of private persons and officers to make arrests were discussed.[6] Now, if one, whether an officer or private person, is making an arrest, and he keeps within the bounds of the law, he does nothing unlawful, consequently he commits no crime though he causes the death of him whom he is attempting to arrest.[7] But a minuter explanation of this subject is desirable.

§ 647. *Further of Homicides in making Arrests and suppressing Disturbances:* —

Killing at and after Arrest. — When, as a general proposition, one refuses to submit to arrest, after he has been touched by the officer, or endeavors to break away after the arrest is effected,[8] he may be lawfully killed, provided this extreme measure is necessary.[9]

[1] Vol. I. § 313 et seq.

[2] And see, particularly, post, § 659 et seq.

[3] See on this subject, Foster, 267; 1 Hale P. C. 496–502; 1 Hawk. P. C. Curw. ed. p. 80, § 4 et seq.; ante, § 630.

[4] Vol. I. § 843, 849, 853–855, 867, 874.

[5] Vol. I. § 849, 850, 863, 865 et seq.

[6] Crim. Proced. I. § 155 et seq.

[7] See, also, Vol. I. § 836 et seq.

[8] As to what constitutes an arrest, see Jones *v.* Jones, 13 Ire. 448; ante, § 26; Crim. Proced. I. § 156 et seq.

[9] 1 Hale P. C. 481, 494–496; 1 Hawk. P. C. Curw. ed. p. 81, 82. Russell says: "In all cases, whether civil or criminal, where persons having authority to arrest or imprison, and using the proper means for that purpose, are resisted in so doing, they may repel force with force and need not give back; and if the party making resistance is unavoidably killed in the struggle, this homicide is justifiable." 1 Russ. Crimes, 3d Eng. ed. 665. See also p. 666, 667. And see The State *v.* Anderson, 1 Hill, S. C. 327; Reg. *v.* Dad-

Before Arrest, to effect it. — And, in cases of felony, the killing is justifiable before an actual arrest is made, if in no other way the escaping felon can be taken.[1]

Expositions by Gabbett. — Gabbett has stated the law, with apparent correctness, as follows:[2] —

§ 648. **Killing a flying Felon.** — "In cases of felony, if the felon fly from justice, or if a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape; and, if, in the pursuit, the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable; and the same rule holds if the felon, after being legally arrested, break away and escape. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not."[3]

§ 649. **Killing one flying from Misdemeanor.** — "The justification of homicide happening in the arrest of persons charged with misdemeanors, or breaches of the peace, is subject to a different rule from that which we have been laying down in respect to cases of felony; for, generally speaking, in misdemeanors it will be murder to kill the party accused, for flying from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; but, under circumstances, it may amount only to manslaughter, if it appear that death was not intended.[4] In some instances, however, of flight in cases of flagrant misdemeanors, such as that of a dangerous wound given, the killing may be justified, if the party cannot be otherwise overtaken; but this is founded upon a presumption that the offence may turn out to be a felony."[5]

son, 2 Den. C. C. 35, Temp. & M. 385, 14 Jur. 1051, 1 Eng. L. & Eq. 566, commented on Vol. I. § 441; The State *v.* Roane, 2 Dev. 58; United States *v.* Jailer of Fayette, 2 Abb. U. S. 265, 280; Calfielde's Case, 1 Rol. 189; Mackalley's Case, 9 Co. 65 *a*.

[1] 1 Hale P. C. 481; Rex *v.* Finnerty, 1 Crawf. & Dix C. C. 167, note. Hawkins says: "If a person, having actually committed a felony, will not suffer himself to be arrested, but stand on his own defence or fly, so that he cannot possibly be apprehended alive by those who pursue him, whether private persons or public officers, with or without a warrant from a magistrate, he may be lawfully slain by them." 1 Hawk. P. C. Curw. ed. p. 81, § 11. And an officer may kill an innocent person who will not give himself up on a warrant for felony. Ib. § 12; 1 Russ. Crimes, 3d Eng. ed. 666. See Duperrier *v.* Dautrive, 12 La. An. 664.

[2] 1 Gab. Crim. Law, 482, 484–487. See ante, § 506, note.

[3] 1 East P. C. 298; 1 Gab. Crim. Law, 482.

[4] 1 Hale P. C. 481; Foster, 271.

[5] 1 East P. C. 302; 1 Gab. Crim. Law, 484.

§ 650. **Killing one resisting Arrest for Misdemeanor.** — "But in misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance, and the offender is killed in the struggle, the killing will be justified.[1] . . .

Jailer, &c., killing, being resisted. — "Jailers and their officers are under the same special protection that other ministers of justice are; and, therefore, if, in the necessary discharge of their duty, they meet with resistance, whether from prisoners in civil or criminal suits, or others in behalf of such prisoners, they are not obliged to retreat so far as they can with safety; but may freely, and without retreating, repel force by force. And if the party so resisting happens to be killed, this, on the part of the jailer or his officer, or any person coming in aid of him, will be justifiable homicide.[2] But an assault upon a jailer which would warrant him (apart from any personal danger) in killing a prisoner, must, it should seem, be such from whence he might reasonably apprehend that an escape was intended, which he could not otherwise prevent; for jailers, like other ministers of justice, are bound not to exceed the necessity of the case in the execution of their offices; and accordingly the law upon this subject, as laid down by Sergeant Hawkins, is, that, if a criminal, *endeavoring to break the jail*, assaults the jailer, the latter may lawfully kill him in the affray."[3]

§ 651. **Killing to effect Arrest in Civil Suit.** — "As to arrests in civil suits, if the party against whom the process has issued fly from the officer, and be killed by him in the pursuit, this, according to Lord Hale, is murder; there being no assault or rescue which would make it a case of homicide *se defendendo*: but it rather seems that Lord Hale intended only to speak of the officer's intentionally killing the defendant in his flight: and Mr. Justice Foster says, it will be murder or manslaughter as circumstances may vary the case; for, if the officer in the heat of the pursuit and merely in order to overtake the defendant should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should unhappily ensue, this will not amount to more than manslaughter; the blood being heated in the pursuit, and no signal mischief in-

[1] 2 Hale P. C. 117; 1 East P. C. 302, 303; 1 Gab. Crim. Law, 484.

[2] Foster, 321.

[3] 1 Hawk. P. C. Curw. ed p. 81, § 13; 1 Hale P. C. 496; 1 East P. C. 331; 1 Gab. Crim. Law, 485.

tended; though, if he should make use of a deadly weapon, it will amount to murder.[1] The case of a defendant flying after an arrest actually made, or out of custody in execution for debt, seems to be governed by the same rules as where the party flies to avoid an arrest; but certainly, notwithstanding the case reported by Rolle to the contrary, if resistance be made, the person having authority to arrest or retake may repel force with force, and need not give back; and, if death unavoidably ensue in the struggle, he will be justified."[2]

§ 652. **Killing the Person making Arrest.** — If an officer or a private person is proceeding according to law to arrest an offender, the latter has no more right to kill him as an act of resisting the arrest than to kill any other person; and, if he does commit the homicide, it is murder.[3] Even where the arresting person is proceeding unlawfully, — as where, he being an officer, the process is so defective as to be null, or he exceeds his authority,[4] or undertakes to arrest for a misdemeanor without any warrant,[5] — if he kills the arresting person, he commits the less grave felonious homicide of manslaughter.[6]

§ 653. **Killing in Interference in Breaches of Peace.** — When there is a quarrel between persons who have come to blows, or a riot, or other public breach of the peace, the duty is imposed on every one not an officer, especially therefore on every officer, to interfere in a proper manner, and separate the combatants, or suppress the disturbance. And if, after an individual under this duty gives notice of his object in interfering, those persons fall on and kill him, they commit a felonious homicide of the higher kind called murder; while, if he does not give notice, the killing is a felonious homicide of the lower kind called manslaughter.[7] And a

[1] 1 Hale P. C. 481; Foster, 271.

[2] 1 Hale P. C. 494; Calfielde's Case, 1 Rol. 189; 1 East P. C. 307; 1 Gab. Crim. Law, 486, 487.

[3] See Vol. I. § 868 et seq.; 1 Hawk. P. C. Curw. ed. p. 81, § 14; Rex *v.* Edmeads, 3 Car. & P. 390; Tom *v.* The State, 8 Humph. 86; Rex *v.* Woolmer, 1 Moody, 334; Rex *v.* Whithorne, 3 Car. & P. 394; Rex *v.* Baker, 1 Leach, 4th ed. 112, 1 East P. C. 323; Rex *v.* Ball, 1 Moody, 330; Rex *v.* Ball, 1 Moody, 333; Mackaley's Case, Cro. Jac. 279; s. c. nom. Mackalley's Case, 9 Co. 65 *a*; Pew's Case, Cro. Car. 183; Rex *v.* Ford, Russ. & Ry. 329; People *v.* Pool, 27 Cal. 572; Reg. *v.* Porter, 12 Cox C. C. 444, 5 Eng. Rep. 497. And see Reg. *v.* Price, 8 Car. & P. 282.

[4] Rafferty *v.* People, 12 Cox C. C. 617; Reg. *v.* Lockley, 4 Fost. & F. 155.

[5] Reg. *v.* Chapman, 12 Cox C. C. 4, 2 Eng. Rep. 160.

[6] Vol. I. § 868; Crim. Proced. I. § 162; Lyon *v.* The State, 22 Ga. 399.

[7] Rex *v.* Tomson, J. Kel. 66; Ashton's Case, 12 Mod. 256; Rex *v.* Keat, 5 Mod. 288, 292; Reg. *v.* Hagan, 8 Car &

mere private person, thus interfering, may even justify the killing of a rioter, if it was inevitable.[1]

§ 654. **Notice of Official Character.** — The books appear to be not quite distinct on the question, whether or not an officer, interfering with disturbers of the peace, must give notice of his official character.[2] On principle, this seems to be unnecessary, because his official character is presumed to be known.[3] Yet there is authority for holding, that, in order to render the killing of an officer of justice, acting either by right of his office or under a warrant, murder, when he interferes in an affray, he must have given some notice of his being an officer, and of his object in interfering. "But, in these cases, a small matter will amount to a due notification."[4] On the other hand, in an old case we read: "It was held, *per totam curiam*, that, if, upon an affray, the constable and others in his assistance come to suppress the affray, and preserve the peace, and in executing their office the constable or any of his assistants is killed, it is murder in law, although the murderer knew not the party that was killed, and although the affray was sudden; because the constable and his assistants came by authority of law to keep the peace, and prevent the danger which might ensue by the breach of it; and therefore the law will adjudge it murder, and that the murderer had malice prepense, because he set himself against the justice of the realm. So, if the sheriff or any of his bailiffs or other officers is killed in executing the process of the law, or in doing his duty, it is murder; the same law of a watchman, who is killed in the execution of his office."[5]

§ 655. **Manner of the Interference.** — Persons undertaking to separate those who are engaged in a fight, or otherwise to preserve the peace, are required themselves to abstain from undue measures. Thus, —

P. 167; The State *v.* Ferguson, 2 Hill, S. C. 619. And see Reg. *v.* Mabel, 9 Car. & P. 474; Commonwealth *v.* Mitchell, 1 Va. Cas. 116; Reg. *v.* Lockley, 4 Fost. & F. 155; 1 Hawk. P. C. Curw. ed. p. 82, § 14, p. 101, § 48–50; Crim. Proced. I. § 183.

[1] Pond *v.* People, 8 Mich. 150; post, § 655.

[2] See Crim. Proced. I. § 189–192.

[3] See, as furnishing an explanation possibly a little different, Stanley's Case, J. Kel. 86. The doctrine concerning ignorance of fact, stated Vol. I. § 305, should not, however, be overlooked, as it bears upon this question. And see Foster, 310, 311; 1 Hawk. P. C. Curw. ed. p. 101, § 50.

[4] Rex *v.* Gordon, 1 East P. C. 315, 352; and see ib. p. 316, 318.

[5] Yong's Case, 4 Co. 40 *a*.

Killing with Club. — Two men coming to blows, a third dismounted from his horse, armed himself with a club, interposed between them, and killed one of them; and he was held not to be within the protection cast over those who prevent breaches of the peace, but to be guilty of murder.[1] And, —

Officer needlessly knocking down. — A policeman, who may lay his hand gently on one playing music in a public street, attracting a crowd, and request him to move along, or may slightly push him if necessary to give effect to the request, has no right therefore to inflict on him a blow, and knock him down.[2] Still, —

Killing necessary. — If rioters and other like offenders stand their ground, and only by killing them can the disorder be suppressed, they who do it are justified.[3]

§ 656. *Some Comprehensive Views:* —

Rule to determine what Killing indictable. — If a man in doing what the law neither requires nor forbids, or in strictly performing a legal duty, and exercising such care as the circumstances demand, causes the death of another, he commits no offence; but, if he is doing something which the law does not command, of a sort endangering life, — or if in the performance of a legal duty he is grossly careless, in a way to put life in jeopardy, — or if he is committing some breach of the criminal laws which is *malum in se*, — or if he is neglecting a legal duty, where the neglect endangers life, — he then becomes guilty of a felonious homicide should death, however unintended, result within a year and a day to a human being. Of course, also, if he means death, under circumstances affording no legal excuse for the killing, the consequence is the same. Some illustrations of this rule have already been given: let us proceed with others.

Lawful Force to unlawful Extreme. — Where it is lawful to use force, there may still be an extreme which is unlawful; then, if one goes to this extreme, he is indictable should death follow. Thus, —

Chastisement. — A parent is authorized to inflict correction on his child, but never death; consequently he must not employ a

[1] Johnston's Case, 5 Grat. 660. And see Conner *v.* The State, 4 Yerg. 137; People *v.* Cole, 4 Parker C. C. 35.

[2] Reg. *v.* Hagan, 8 Car. & P. 167. And see Reg. *v.* Jones, 9 Car. & P. 258.

[3] 1 Hawk. P. C. Curw. ed. p. 81, § 14; ante, § 648 et seq., 653.

force calculated to produce death. If he does, and death actually follows, he is indictable for the homicide.[1] Again, —

Defence of Property. — A man may defend his property, not speaking now of his castle,[2] by a certain degree of force, not to the taking of an aggressor's life.[3] If, therefore, he does take life in such defence, he is punishable for the homicide.[4] Whence we may infer that, —

Attempt. — If, in defending mere property, he exhibits loaded fire-arms or other like weapons, intending to use them should the emergency arise, he thereby incurs the guilt of attempting to commit a felonious homicide, when, through fear, the aggressor desists. This proposition is suggested to the thoughtful reader as probably sound; but it seems to be neither sustained nor overthrown by direct adjudication.[5]

§ 656 *a*. **Unlawful Force.** — If a lawful force carried to an unlawful extreme will render the party employing it indictable for a felonious homicide should death accidentally follow, much more will it be so when the force is wholly unlawful. And, as already explained,[6] "unlawful" does not mean, in this connection, "indictable." Thus, —

Injury to Girl with her Consent. — If a man, to render practicable an unlawful commerce with a girl, employs artificial means with her consent, inflicting unintentionally a wound which causes her death, he, and those assisting him, are together guilty of manslaughter.[7]

§ 656 *b*. **Carelessness.** — Into the case last put, something of the element of carelessness entered. We saw, in the first volume,[8] some illustrations of the carelessness which, if death accidentally results from it, will render the party guilty of a felonious homicide. Thus, —

Indiscriminate use of Fire-arms. — In an old case, "the defendant came to town in a chaise, and before he got out of it he fired his pistols, which by accident killed a woman;" this was held to be

[1] Grey's Case, J. Kel. 64. The same principle applies to other persons standing *in loco parentis*. Grey's Case, J. Kel. 64; s. c. nom. Gray's Case, J. Kel. 133; Keat's Case, Skin. 666.

[2] Vol. I. § 858, 859.

[3] Vol. I. § 861, 862, 875.

[4] Vol. I. § 876.

[5] See People *v.* Honshell, 10 Cal. 83; Pond *v.* People, 8 Mich. 150; People *v.* Payne, 8 Cal. 341.

[6] Ante, § 642.

[7] The State *v.* Center, 35 Vt. 378.

[8] Vol. I. § 314, 317, 321.

manslaughter.[1] All acts of this general sort, from which death unintended proceeds, subject the doer to punishment for felonious homicide;[2] as, "if a man take a gun, not knowing whether it is loaded or unloaded, and using no means to ascertain, and fire it in the direction of any other person, and death ensues, he is guilty of manslaughter."[3] If, however, a man has a duty to discharge, as in military drill, the same consequence will not always follow when death accidentally results from the use of a fire-arm.[4] Again, —

Careless driving. — The law is the same where one carelessly drives over another, and thus unintentionally causes death.[5]

§ 657. **Summary.** — The doctrine in brief is this, that any employment of unlawful force, whereby the death of a human being is produced, whether intended or not, will subject the doer to indictment for a felonious homicide.[6] If the force is of a kind not lawful under the circumstances,[7] it comes within the condemnation, however accidental the death may be. If, being of the lawful sort, it is employed to an extent unlawful, it is the same as if it were unlawful in kind. Therefore a full discussion of this question would reach into every department of legal science, and exhaust the whole. But, to repeat in part, firing a loaded gun into a travelled way,[8] or at a person supposed to be too far distant to be reached by it,[9] or discharging loaded fire-arms in any careless manner for the purpose of frightening another,[10] or performing an operation meant merely to procure an abortion,[11] or administering a deleterious drug,[12] or correcting with an improper instrument one under subjection,[13] or correcting such a one by too severe a punishment,[14] or forcing a person to perform

[1] Rex *v.* Burton, 1 Stra. 481.

[2] Sparks *v.* Commonwealth, 3 Bush, 111; Golliher *v.* Commonwealth, 2 Duvall, 163; Reg. *v.* Jones, 12 Cox C. C. 628, 10 Eng. Rep. 510.

[3] Keating, J., in Reg. *v.* Campbell, 11 Cox C. C. 323, 324.

[4] Reg. *v.* Hutchinson, 9 Cox C. C. 555.

[5] Lee *v.* The State, 1 Coldw. 62; Reg. *v.* Dalloway, 2 Cox C. C. 273.

[6] See ante, § 620.

[7] Ante, § 656.

[8] People *v.* Fuller, 2 Parker C. C. 16.

[9] Studstill *v.* The State, 7 Ga. 2.

[10] The State *v.* Roane, 2 Dev. 58; Collier *v.* The State, 39 Ga. 31. And see Pennsylvania *v.* Lewis, Addison, 279; Errington's Case, 2 Lewin, 217; Rex *v.* Sullivan, 7 Car. & P. 641; Rex *v.* Conner, 7 Car. & P. 438.

[11] See cases cited ante, § 641; post, § 691; Yundt *v.* People, 65 Ill. 372; The State *v.* Moore, 25 Iowa, 128.

[12] Cases cited ante, § 641.

[13] Grey's Case, J. Kel. 64; s. c. nom. Gray's Case, J. Kel. 133; Keat's Case, Skin. 666; ante, § 656.

[14] Post, § 663, 683–685.

any act dangerous to life,[1] or entering in anger into a struggle by fighting or otherwise,[2] or an affray,[3] or committing any other breach of the peace,[4] or doing any other thing not warranted by the law,[5] — is such a wrongful exhibition of elements unlawful as subjects the party putting them in motion to the charge of felonious homicide, if death however unintended follows.

§ 658. **Continued.** — Or we may sum up the doctrine thus: Whenever a man commits any offence, where the act is *malum in se*, and not merely *malum prohibitum*;[6] or distinctly violates or neglects to do a plain duty, imposed either by law or by contract;[7] or does an injurious act in mere wanton sport,[8] — if death follows as a consequence not too remote, and if the act itself, or the omission,[9] is not too insignificant,[10] — the party causing the death will be guilty of either murder or manslaughter, according to the circumstances of the case. It will be useful, however, to follow these more general views with some which are more specific.

§ 659. *Neglects :*[11] —

General Doctrine. — The doctrine, in general terms, is, that, wherever there is a legal duty, and death comes by reason of any omission to discharge it, the party omitting is guilty of a felonious homicide. But if the duty is only a moral one, and the dereliction is merely an omission to do, in distinction from an actual doing, there is no legal responsibility.[12] Yet, —

Positive Act. — The responsibility appears to be the same in

[1] Reg. *v.* Pitts, Car. & M. 284; United States *v.* Freeman, 4 Mason, 505. And see Reg. *v.* Marriott, 8 Car. & P. 425.

[2] Reg. *v.* Cannift, 9 Car. & P. 359; The State *v.* Underwood, 57 Misso. 40; Reg. *v.* Caton, 12 Cox C. C. 624, 10 Eng. Rep. 506.

[3] The State *v.* Hudson, 59 Misso. 135.

[4] Reg. *v.* Harrington, 5 Cox C. C. 231; Reg. *v.* Young, 10 Cox C. C. 371.

[5] Chichester's Case, Aleyn, 12; Reg. *v.* Murton, 3 Fost. & F. 492; Reg. *v.* Turner, 4 Fost. & F. 339; Reg. *v.* Towers, 12 Cox C. C. 530, 8 Eng. Rep. 585; Reg. *v.* Horsey, 3 Fost. & F. 287; Reg. *v.* Gardner, 1 Fost. & F. 669; Reg. *v.* Lee, 4 Fost. & F. 63.

[6] Vol. I. § 331, 333.

[7] Chichester's Case, Aleyn, 12; ante, § 643; post, § 659 et seq.

[8] Pennsylvania *v.* Lewis, Addison, 279; Rex *v.* Sullivan, 7 Car. & P. 641; Errington's Case, 2 Lewin, 217; The State *v.* Roane, 2 Dev. 58.

[9] Ante, § 642; post, § 659 et seq., Reg. *v.* Packard, Car. & M. 236; Gore's Case, 9 Co. 81 *a*.

[10] Vol. I. § 212 et seq., 334; post, § 668.

[11] For more on this subject, see Vol. I. § 313 et seq.; ante, § 643.

[12] Vol. I. § 217, 314, 321; Reg. *v.* Hughes, Dears. & B. 248, 7 Cox C. C. 301; Reg. *v.* Lowe, 3 Car. & K. 123, and Mr. Bennett's note in 1 Ben. & H. Lead. Cas. 49; Reg. *v.* Haines, 2 Car. & K. 368; ante, § 643 and note.

the one case as in the other, if a positive act, instead of a mere omission, is the cause of the death. This distinction is not perhaps mentioned in words in any of the cases; but it is clearly deducible from principles, and from facts and conclusions, already in the books.

§ 660. **Illustrations.** — The doctrine may be illustrated thus: —

Neglect of Dependent Person. — If a man neglects to supply his legitimate child with suitable food and clothing,[1] or suitably to provide for his apprentice, whom he is under a legal obligation to maintain, and the child or apprentice dies of the neglect, he is guilty of a felonious homicide.[2] But his wife, if she does the same thing, even toward her own offspring, does not incur this guilt; because the law casts the duty of maintenance on him alone, not at all on her, who stands in this respect in no other relation to him than a mere servant.[3] If one has abiding in his house an idiot brother, who, by his neglect, perishes from want, this is not an omission which casts on him a criminal liability; because he is under no obligation in law to maintain his brother; and "omission, without a duty, will not create an indictable offence."[4] But this refers to a case in which no obligation was assumed; for, if one has voluntarily taken upon himself the obligation, he is responsible if death follows from his gross neglect of it, amounting to a wicked mind.[5]

§ 661. **Continued, as to Principal in Second Degree.** — But, in the case of the wife, there seems, in legal reason, to be no difficulty in holding her liable, when she acts without compulsion, express or implied, from her husband,[6] who is also liable. For, if she is present aiding and abetting him, she becomes thereby a principal of the second degree.[7] And, —

Apply for Relief. — It has been even laid down that parents,

[1] Vol. I. § 883, 884.

[2] Rex *v.* Squire, 1 Russ. Crimes, 3d Eng. ed. 490; Reg. *v.* Crumpton, Car. & M. 597; Rex *v.* Self, 1 Leach, 4th ed. 137, 1 East P. C. 226; Reg. *v.* Bubb, 4 Cox C. C. 455; Reg. *v.* Conde, 10 Cox C. C. 547. See Reg. *v.* Waters, Temp. & M. 57, 1 Den. C. C. 356, 13 Jur. 130, 18 Law J. N. S. M. C. 53; Reg. *v.* Renshaw, 11 Jur. 615, 616; Reg. *v.* Marriott, 8 Car. & P. 425; post, § 686.

[3] Rex *v.* Saunders, 7 Car. & P. 277; Rex *v.* Squire, 1 Russ. Crimes, 3d Eng. ed. 19; Reg. *v.* Edwards, 8 Car. & P. 611; Vol. I. § 364.

[4] Rex *v.* Smith, 2 Car. & P. 449. This was not a case of murder, but it establishes the principle stated in the text. And see Vol. I. § 217.

[5] Reg. *v.* Nicholls, 13 Cox C. C. 75. And see Reg. *v.* Finney, 12 Cox C. C. 625, 10 Eng. Rep. 507; Reg. *v.* Porter, Leigh & C. 394, 9 Cox C. C. 449; Reg *v.* S———, 5 Cox C. C. 279.

[6] See Vol. I. § 356 et seq.

[7] Vol. I. § 648

both father and mother, who are without the means of providing sufficient food and clothing for their helpless children, should apply for public assistance under the poor laws; and, if a child dies in consequence of a neglect to make such application, they are guilty of manslaughter.[1]

§ 662. **Married Persons living Apart.** — In a case before Gurney, B., the doctrine seemed to be received, that, where husband and wife live apart by mutual consent, and he gives her a fixed allowance for her maintenance, he is still under obligation to see that she does not suffer in sickness. If, therefore, she is sick, and her days are shortened from the want of shelter, he may be charged criminally with her death, provided he has notice of her condition, and refuses to supply her; though, *prima facie*, he is under no obligation.[2]

§ 662 *a*. **Running Public Conveyances.** — If persons who have the charge of the running of steamboats,[3] railway trains,[4] and other public conveyances,[5] neglect their duties, and death results from the neglect, they are, under many circumstances, not all, answerable for manslaughter. It will depend upon no one consideration alone, but upon many considerations set down in this chapter and in others of these volumes, whether, in the particular instance, the indictment can be maintained. A criminal case of this sort is governed by principles differing in some measure from a civil one. Hence, —

Contributory Negligence. — For reasons appearing in our first volume,[6] the doctrine of contributory negligence is not applicable in these cases of criminal homicide. "Who," asked Byles, J., in a case where a child had been run over and killed, "is the plaintiff here? The Queen, as representing the nation: and, if they were all negligent together, I think their negligence would be no defence even if they had been adults."[7]

[1] Reg. *v.* Mabbett, 5 Cox C. C. 339.

[2] Reg. *v.* Plummer, 1 Car. & K. 600; post, § 686. See 2 Bishop Mar. & Div. § 401. And see generally, on the subject of separations without divorce, 1 Ib. § 550–656.

[3] Post, § 669; Reg. *v.* Gregory, 2 Fost. & F. 153; United States *v.* Taylor, 5 McLean, 242; United States *v.* Farnham, 2 Blatch. 528; Gerke *v.* California Steam Navigation Co., 9 Cal. 251.

[4] Reg. *v.* Ledger, 2 Fost. & F. 857; Reg. *v.* Pargeter, 3 Cox C. C. 191; Reg. *v.* Trainer, 4 Fost. & F. 105; Reg. *v.* Gray, 4 Fost. & F. 1098; Reg. *v.* Pardenton, 6 Cox C. C. 247; The State *v.* O'Brien, 3 Vroom, 169; Reg. *v.* Smith, 11 Cox C. C. 210; Reg. *v.* Benge, 4 Fost. & F. 504; Reg. *v.* Birchall, 4 Fost. & F. 1087.

[5] Reg. *v.* Jones, 11 Cox C. C. 544.

[6] Vol. I. § 255–263.

[7] Reg. *v.* Kew, 12 Cox C. C. 355, 356, 4 Eng. Rep. 605. And see Reg. *v.* Jones,

§ 663. *Some Relations in Life:*[1] —

Chastisement — (Parent and Child — Master and Servant, &c.). — East observes: "Parents, masters, and other persons having authority *in foro domestico*, may give reasonable correction to those under their care; and, if death ensue from such correction, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances."[2] Where a father, to correct his son for theft, having repeatedly punished him ineffectually, beat him so severely with a rope that he died, he was adjudged guilty of manslaughter only.[3] But where a master, having authority to chastise his servant, broke the servant's skull with an iron bar, he was held to have committed the higher form of felonious homicide called murder.[4] One *in loco parentis*, compelling a child, as a punishment, to work beyond its strength an unreasonable number of hours, and thus hastening its death of consumption, has been deemed guilty only of manslaughter; though the punishment was cruel, and accompanied by violent language; if he believed the child to be shamming sickness, and able to perform all that was demanded.[5] And, in the language of Martin, B., speaking in a case where a father was on trial for the manslaughter of his child two and a half years old: "The law as to correction has reference only to a child capable of appreciating correction, and not to an infant two years and a half old. Although a slight slap may be lawfully given to an infant by her mother, more violent treatment of an infant so young by her father would not be justifiable; and the only question for the jury to decide is, whether the child's death was accelerated or caused by the blows inflicted by the prisoner."[6]

11 Cox C. C. 544; Reg. *v.* Birchall, 4 Fost. & F. 1087, 1088.

[1] For more as to husband and wife, parent and child, master and servant, &c., see Vol. I. § 878 et seq.; ante, § 660–662. Concerning coverture as excusing criminal acts, see Vol. I. § 356.

[2] 1 East P. C. 261; s. p. Foster, 262; ante, § 620.

[3] Anonymous, 1 East P. C. 261.

[4] Rex *v.* Grey, J. Kel. 64, 65. See also Rex *v.* Conner, 7 Car. & P. 438, for a case wherein a mother, angry with a child, threw at it a small iron poker, which accidentally hit another child and killed it; she was held guilty of manslaughter.

[5] Rex *v.* Cheeseman, 7 Car. & P. 455. And see Reg. *v.* Walters, Car. & M. 164.

[6] Reg. *v.* Griffin, 11 Cox C. C. 402, 403.

§ 664. **Physician and Patient**[1] — **(Ignorant practitioner).** — The doctrine as to physician and patient is not quite the same in England and the United States. And possibly it is not entirely harmonious among our States. According to English adjudication, whenever one undertakes to cure another of disease, or to perform on him a surgical operation, he renders himself thereby liable to the criminal law, if he does not carry to this duty some degree of skill, though what degree may not be clear; consequently, if the patient dies through his ill-treatment, he is indictable for manslaughter.[2] Still, in an English case, Willes, J., once put the doctrine in a more reasonable way; thus, — "If a man *knew that he was using medicines beyond his knowledge*, and was meddling with things above his reach, that was culpable rashness. Negligence might consist in using medicines in the use of which care was required, and of the properties of which the person using them was ignorant. A person who so took a leap in the dark in the administration of medicine was guilty of gross negligence."[3] Now, in the facts of human life, the less a man understands of any thing occult, like the unseen workings of medicine, the more confident he is that his knowledge of the thing is perfect. Therefore some of our American courts have laid down the doctrine, not altogether inharmoniously with this utterance of the learned English judge, in substance, that, since it is lawful and commendable for one to cure another, if he undertakes this office in good faith, and adopts the treatment he deems best, he is not liable to be adjudged a felon; though the treatment should be erroneous, and, in the eyes of those who assume to know all about this subject, which, in truth, is understood by no mortal,

[1] Vol. I. § 896 and the places there referred to.

[2] Rex *v.* Spiller, 5 Car. & P. 333; Ferguson's Case, 1 Lewin, 181; Rex *v.* Senior, 1 Moody, 346; Rex *v.* Webb, 1 Moody & R. 405, 2 Lewin, 196; Reg. *v.* Spilling, 2 Moody & R. 107; Rex *v.* Long, 4 Car. & P. 398; Rex *v.* Williamson, 3 Car. & P. 635; Reg. *v.* Markuss, 4 Fost. & F. 356; Reg. *v.* Macleod, 12 Cox C. C. 534, 8 Eng. Rep. 589; Reg. *v.* Chamberlain, 10 Cox C. C. 486; Reg. *v.* Spencer, 10 Cox C. C. 525. In Simpson's Case, 1 Lewin, 172, Bayley, J., observed: "I am clear, that, if a person not having a medical education, and in a place where persons of a medical education might be obtained, takes on himself to administer medicine which may have a dangerous effect, and such medicine destroys the life of the person to whom it is administered, it is manslaughter. The party may not mean to cause death; on the contrary, he may mean to produce beneficial effects; but he has no right to hazard medicine of a dangerous tendency when medical assistance can be obtained. If he does, he does it at his peril."

[3] Reg. *v.* Markuss, 4 Fost. & F. 356, 359. And see Reg. *v.* Crook, 1 Fost. & F. 521; Reg. *v.* Crick, 1 Fost. & F. 519.

grossly wrong; and though he is a person called, by those who deem themselves wise, grossly ignorant of medicine and surgery.[1]

Careless Practitioner. — As to the mere carelessness of medical practitioners, and persons not practitioners dealing with medicine in the particular instance, there is probably no difference between the English and American law. Any person undertaking a cure, but being grossly careless, and thus producing death, is liable to a charge of manslaughter, whether he is a licensed practitioner or not.[2] For example, a nurse who, knowing that laudanum is poison, gives it to an infant in a quantity to produce death, is guilty of a felonious homicide; and it has even been said, that, in the absence of qualifying evidence, the degree of the offence will be murder.[3] Not every mistake, from which death follows, will subject a medical practitioner, or one who puts up medicines, to punishment if fatal results ensue;[4] but the negligence must be gross, traceable, Willes, J., said in one case, "to an evil mind."[5]

§ 665. **Duty assumed by Contract.** — In general, a breach of mere contract is not an indictable offence.[6] But if death follows from the breach of a contract, the party is liable as for crime.[7] Thus, —

Cannon Bursting. — Where an iron founder, employed to make some cannon for use on a day of public rejoicing, having furnished one piece, which burst and was returned to him, sent it back in so imperfect a state that it burst a second time, killing three men, he was held to be guilty of manslaughter.[8] But, —

[1] Commonwealth *v.* Thompson, 6 Mass. 134; Rice *v.* The State, 8 Misso. 561; Vol. I. § 314, note.

[2] Rex *v.* Van Butchell, 3 Car. & P. 629; Rice *v.* The State, 8 Misso. 561; Rex *v.* Long, 4 Car. & P. 423; Rex *v.* Spiller, 5 Car. & P. 333; Reg. *v.* Bull, 2 Post. & F. 201; Reg. *v.* Chamberlain, 10 Cox C. C. 486; Reg. *v.* Macleod, 12 Cox C. C. 534, 8 Eng. Rep. 589.

[3] The State *v.* Leak, Phillips, 450. See Reg. *v.* Bull, supra.

[4] Reg. *v.* Noakes, 4 Post. & F. 920; Reg. *v.* Macleod, supra; Vol. I. § 217.

[5] Reg. *v.* Spencer, 10 Cox C. C. 525.

[6] Vol. I. § 582. The reason is because, in the facts of cases, it does not generally create a duty to the public, or any other duty of the indictable sort But in the language of a learned Alabama judge, "When a party owes the public a duty, although resulting from a contract, he is indictable for a breach of that duty." A. J. Walker, C. J., in Stein *v.* The State, 37 Ala. 123, 130. **Nuisance in supplying Bad Water.** — Therefore in the case in which this observation occurs, the defendant, who had contracted to supply a city with wholesome water, was held to be indictable for a nuisance when the supply which he furnished was unwholesome.

[7] Ante, § 660.

[8] Rex *v.* Carr, 8 Car. & P. 163. And see post, § 696.

Allegation in Indictment. — There must, as we have seen,[1] be a duty; and, if the indictment does not allege a duty, the defendant cannot be convicted.[2]

§ 666. **Jailer and Prisoner.** — If a jailer confines his prisoner in an unwholesome room, and neglects to give him necessaries for cleanliness, whereby the prisoner contracts a disease of which he dies, this jailer commits thereby the crime of murder.[3] His neglect is a gross violation of duty.

§ 667. **Public Duty without Contract — (Way).** — If one is using a public way, whether of land or water, and by carelessness in its use destroys unintentionally a human life, he is guilty of felonious homicide;[4] for, although he was under no contract, yet he was under an obligation, which the law recognizes, to use the way with care.

Non-feasance. — There are, indeed, suggestions in the books, that a mere non-feasance in such a case is not sufficient.[5] But reasons have been already given why such a distinction cannot be deemed good in legal doctrine, in cases where the law imposes a duty.[6]

§ 668. *Proximity of the Wrongful Thing to the Death:* —

Sufficiently proximate. — In these cases the wrongful thing must be sufficiently proximate to the death. Thus, —

Neglect to contract — (Employing Incompetent Servant). — In England, trustees appointed under a local act to repair roads, with power to contract for the making of the repairs, were held not to be chargeable with manslaughter, if, neglecting to contract, a road becomes out of repair, and a man who uses it is therefore accidentally killed. "No doubt," said Lord Campbell, C. J., "the neglect of a personal duty, when death ensues as the consequence of such neglect, renders the party guilty of it liable to an indictment for manslaughter; and the cases which have been cited in the course of the argument, and which establish that doctrine, are good law. I myself tried a prisoner for not taking

[1] Ante, § 660.

[2] Reg. *v.* Barrett, 2 Car. & K. 343.

[3] Rex *v.* Huggins, 2 Stra. 882, 2 Ld. Raym. 1574; Vol. I. § 328; post, § 687, 689. And See Castell *v.* Bambridge, 2 Stra. 854, 856.

[4] Reg. *v.* Taylor, 9 Car. & P. 672; Rex *v.* Swindall, 2 Car. & K. 230; United States *v.* Warner, 4 McLean, 463; United States *v.* Collyer, Whart. Hom. 483; Rex *v.* Walker, 1 Car. & P. 320; Rex *v.* Timmins, 7 Car. & P. 499; Rex *v.* Grout, 6 Car. & P. 629; Rex *v.* Mastin, 6 Car. & P. 396.

[5] Rex *v.* Green, 7 Car. & P. 156. And see Rex *v.* Allen, 7 Car. & P. 153.

[6] Vol. I. § 217, 420; ante, § 659 and authorities cited in the note.

proper care in managing the shaft of a mine. He intrusted the management of it to an incompetent person, who said at the time that he was incompetent. The prisoner was convicted; and I did not hesitate to inflict a severe sentence. But how can the principle I have stated apply to the present case? It cannot be said that the trustees are guilty of felony in neglecting to contract. Not only must the neglect, to make the party guilty of it liable to the charge of felony, be personal, but the death must be the immediate result of that personal neglect. According to the argument here, it might be said, that, where the inhabitants generally are bound to repair, and a death is caused as in the present case, all the inhabitants are indictable for manslaughter."[1]

§ 669. **Furnishing Opportunity to another.** — And where one, having the charge of a steam-engine, stopped it and went away; but another came and set it in motion, causing a person to be killed; the former one was held not to be guilty of manslaughter.[2]

No one on look-out. — A case of the captain and pilot of a steamboat, in England, turned possibly on this distinction; though the judges seemed not to put it on any particular ground. The fact was, that the steamer had run down a smack, killing one on board the latter. The running down was attributed, by the prosecutor, to improper steerage of the steamboat, owing to there being no man at the bow on look-out. The proof showed a look-out to have been kept there when the boat started, an hour before. According to one witness, both the captain and pilot were at the time of the accident on the bridge between the paddle-boxes; according to another witness, the pilot alone was there. The time was night, dark, rainy; the steamer had lights, but the smack had not. An acquittal was directed. Park, J., observed, among other things, that the question involved was, whether there was "gross negligence."[3]

§ 670. *Views of the Intent:* —

Specific Intent Unnecessary. — The intent need not be to kill;[4] while yet the law, neither under this title nor under any other, would tolerate the conviction of one for crime unless his mind

[1] Reg. *v.* Pocock, 17 Q. B. 34, 38, 24 Eng. L. & Eq. 190. See Vol. I. § 223–227.

[2] Hilton's Case, 2 Lewin, 214.

[3] Rex *v.* Allen, 7 Car. & P. 153. See Reg. *v.* Marriott, 8 Car. & P. 425.

[4] Vol. I. § 217, 314, 318, 321, 328, 332, 334, 736; post, § 679.

were criminal.[1] Perhaps the full discussion of the question of the intent necessary to constitute a crime, contained in the preceding volume,[2] will better guide the reader in cases of homicide than any thing which can be said here.

§ 671. **Drunkenness.** — In the first volume, also, was considered the effect of drunkenness in homicide,[3] as well as in other crimes. No further discussion of the question is needed here.

III. *What Indictable Homicides are Murder and what are Manslaughter.*

§ 672. **Murder is of "Malice aforethought."** — We saw, in the historical subdivision of this chapter, that, according to the terms of the old statutes which have separated indictable homicides into the two degrees now known as murder and manslaughter, the former are distinguished from the latter by being committed of "malice aforethought," or perhaps, to speak more exactly, "wilfully and of malice aforethought."[4] The word "wilfully," however, does not appear to add any thing to the meaning of the expression; while, for still other reasons appearing in the work on Criminal Procedure, there is more than doubt whether it ought to have place in the definition of murder.[5] To ascertain, therefore, whether a felonious killing is murder or manslaughter, we have simply to inquire whether it was committed of "malice aforethought" or not.

§ 673. **Difficulties and their Source.** — But this inquiry is not a simple one. In former times, when in felony prisoners were compelled to appear without counsel, and the judge was in a measure counsel for them, and when the distinction between the functions of judge and jury was not well defined, and judges undertook to assist jurors as to the facts more than they do now, many things were laid down from the bench and transferred to our law books, of which no one can say whether they were meant to be opinions on the law or on particular facts in evidence. And, particularly in homicide, it was customary[6] for the

[1] Vol. I. § 287.

[2] Vol. I. § 205, 206, 285 et seq.

[3] Vol. I. § 397 et seq.; People *v.* Hammill, 2 Parker C. C. 223; People *v.* Robinson, 2 Parker C. C. 235; Pennsylvania *v.* McFall, Addison, 255, 257; Pennsylvania *v.* Lewis, Addison, 279, 282; People *v.* Fuller, 2 Parker C. C. 16.

[4] Ante, § 623–628; Crim. Proced. II. § 498–500.

[5] Crim. Proced. II. § 545, 546.

[6] Vol. I. § 848.

jury to find the special facts, and submit them to the court to determine whether the grade of the crime was murder or manslaughter. But the form of the finding was largely such as compelled the judges to draw inferences of fact from facts found; these inferences have been transmitted to us in the books as though they were inferences of law; they have been subsequently followed; and so a system of things has grown up, contrary to true principle and true law. Is it, then, a question of law, whether, under the particular circumstances of a case, the killing is to be deemed of "malice aforethought," or is it a mere question of fact whether or not the prisoner's mind was in a state described by the words "malice aforethought"? Now, according to what we read in the books generally, this question is a mixed one, wherein law and fact are so blended as to leave the partition line at places uncertain, and at others variable and jagged.

§ 673 *a*. **The Presumptions.** — It is plain, therefore, that the difficulties attending our present inquiry relate to the presumptions, whether of law or fact, to be drawn from acts, as constituting or not the "malice aforethought" which distinguishes murder from manslaughter. But this doctrine of presumptions[1] is unsettled and uncertain in all the departments of our law, while it is specially so in the law of our present sub-title. What was reasonably clear once is dim now; for time, in this matter, has brought mists, not sunshine. Thus, in 1727, at the close of the reign of Geo. I., Raymond, C. J., delivering the unanimous opinion of the twelve judges of England, said: "The judges are to determine what is malice, or what is a reasonable time to cool; and they must do it upon the circumstances of the case; the jury are judges only of the fact, and we must determine whether it be deliberate or not. Hence it is, that, in summing up an evidence, the judges direct the jury, if you believe such a fact, it is so; if not, it is otherwise; and they find either a general or a special verdict upon it. There is no instance where the jury ever find that the fact was done of malice, or that the party had or had not time to cool; but that must be left to the judges upon the circumstances of the case."[2] Now, according

[1] Crim. Proced. I. § 1096–1131; in case of homicide, Ib. II. § 598–608.

[2] Rex *v.* Oneby, 2 Stra. 766, 773.

to the modern cases, as well as the ancient, it is a question of law, not of fact, whether or not a particular interval amounts to a sufficient cooling time;[1] but it is not the doctrine of all the courts of the present day, that, upon certain facts being established, it is exclusively for the court to draw the inference of malice.[2] Still, after an examination of the cases, one is surprised to find how uncertain and unsettled this sort of question is in those of modern date.

§ 673 *b*. **In Principle.** — According to the analogies of the modern law of evidence, and the better procedure before juries, the judge, in charging a jury, should tell them that the homicide, to be murder, must be committed of what the law terms malice aforethought, which is a technical term in legal language, with a defined legal meaning. He should then explain its meaning, as viewed in connection with the facts in evidence; and explain the presumptions which may be deduced from the facts; adding, that it is for them to look at the evidence, and the reasonableness of the presumptions suggested, and decide, as a question of fact, whether or not the law's malice aforethought existed in the present instance.

§ 674. **Further Course of this Sub-title, and how divided.** — It is perceived that the difference is, whether these presumptions are of law or of fact. The difference, therefore, will not embarrass our future discussions. If one court deems a presumption to be of law, it can give direction to a cause on that basis; if another deems it to be of fact, it can instruct the jury on that basis; and the elucidations of this sub-title will be equally serviceable to both. We shall consider, First, The intent; Secondly, The act viewed apart from what may be the real intent; Thirdly, The act viewed in combination with the intent; Fourthly, The act viewed in connection with the conduct of the person killed, as exciting the passions, or otherwise; Fifthly, Such act contemplated in reference to the conduct of third persons; Sixthly, The distinction between murder and manslaughter under the statutes of some of our States.

[1] Post, § 713.

[2] Dukes *v.* The State, 14 Fla. 499; People *v.* Campbell, Edm. Sel. Cas. 307; The State *v.* Tachanatah, 64 N. C. 614; Flanagan *v.* The State, 46 Ala. 703; Reg. *v.* Eagle, 2 Fost. & F. 827. See People *v.* Aro, 6 Cal. 207.

§ 675. First. *The Intent distinguishing Murder from Manslaughter:* —

"Malice aforethought" interpreted. — According to ordinary modern methods of dealing with statutes, the term "malice aforethought" would be accepted as merely referring to the intent with which a homicide is committed. But, at a time when courts took more liberties with legislative words than they do now, it received a more liberal construction, which became a part of the law itself, and remains to the present day. It may, therefore, be deemed to signify, not actual "malice," or actual "aforethought," or any other actual state of the mind, but any such combination of wrongful deed and mental culpability as judicial usage has determined to be sufficient to render that murder which else would be only manslaughter. Still the books generally define malice aforethought to be such a depraved condition of mind as shows a total disregard of social duty, and a heart bent wholly on evil.[1] Of course, if a man, without any justification, deliberately resolves to take a human life and takes it, this is murder. Hence, —

Malice express or implied. — It is common in the books to speak of the malice in murder as being either express or implied,[2] — a distinction of no practical value.

§ 676. **Intent to kill.** — An actual intent to take life is not a necessary ingredient in murder,[3] any more than it is in manslaughter. Still, if, in a particular instance, this actual intent exists, it may make that murder which otherwise would not be criminal, or would be only manslaughter.[4] On the other hand, the intent to take life may exist while there is no crime committed in taking it. It is so when an officer executes sentence of death under a lawful warrant, or one in self-defence intentionally takes the aggressor's life to save his own, as well as in vari-

[1] The State *v.* Jarrott, 1 Ire. 76; United States *v.* Cornell, 2 Mason, 60, 91; The State *v.* Smith, 2 Strob. 77. And see Beauchamp *v.* The State, 6 Blackf. 299; Vol. I. § 427, 429. See also People *v.* Divine, Edm. Sel. Cas. 594; Reg. *v.* Noon, 6 Cox C. C. 137; Wellar *v.* People, 30 Mich. 16; Commonwealth *v.* Drum, 8 Smith, Pa. 9; McAdams *v.* The State, 25 Ark. 405; The State *v.* Decklotts, 19 Iowa, 447; The State *v.* Gillick, 7 Iowa, 287; Nye *v.* People, 35 Mich. 16; Farris *v.* Commonwealth, 14 Bush, 362.

[2] Rex *v.* Oneby, 2 Stra. 766, 770; Warren *v.* The State, 4 Coldw. 130; Perry *v.* The State, 43 Ala. 21; People *v.* Haun, 44 Cal. 96; Read *v.* Commonwealth, 22 Grat. 924.

[3] Post, § 679 et seq.; Scott *v.* The State, 37 Ala. 117; People *v.* Freel, 48 Cal. 436; The State *v.* Decklotts, 19 Iowa, 447.

[4] Post, § 692–694.

ous other circumstances.[1] And in some circumstances, when one intends to take life and does it, his offence is manslaughter, but not murder.[2] Thus, in the language of Redfield, C. J., sitting in the Vermont court, "if the jury should regard this as a *bona fide* case of mutual combat, without previous malice on the part of the accused, and that mutual blows were given before the accused drew his knife, and that he drew it in the heat and fury of the fight, and dealt a mortal wound, although with the purpose of doing just what he did do, — that is, of taking life, — or what would be that intent if he had been in such a state as properly to comprehend the nature of his act, still it is but manslaughter."[3]

§ 677. **"Aforethought."** — The word "aforethought,"[4] in the definition of murder, has been construed by the courts to mean almost, if not quite, nothing. There is no particular period during which it is necessary the "malice" should have existed, or the prisoner should have contemplated the homicide.[5] If, for example, the intent to kill, or to do other great bodily harm, is executed the instant it springs into the mind, the offence is as truly murder as if it had dwelt there for a longer period.[6] Still premeditation may be an element showing malice when otherwise it would not sufficiently appear.[7] Therefore, —

"Malice." — The "malice" of the old statute is the principal thing; it must always exist in murder.[8]

§ 678. **Drunkenness.** — In considering the effect of drunkenness as an excuse for criminal acts, the writer brought to view many things relating to the intent in homicide. To that discussion, therefore, the reader is referred.[9]

[1] Post, § 695; People *v.* Barry, 31 Cal. 357.

[2] Maher *v.* People, 10 Mich. 212, 219; Erwin *v.* The State, 29 Ohio State, 186; Nye *v.* People, 35 Mich. 16.

[3] The State *v.* McDonnell, 32 Vt. 491, 541. To the like effect is Dennison *v.* The State, 13 Ind. 510.

[4] The word in the English statute, from which the distinction between murder and manslaughter has come to us, is "prepensed." See ante, § 624–628.

[5] Post, § 695, 728.

[6] Post, § 695; People *v.* Clark, 3 Seld. 385; Mitchum *v.* The State, 11 Ga. 615; Green *v.* The State, 13 Misso. 382; Rex *v.* Legg, J. Kel. 27, 128; Beauchamp *v.* The State, 6 Blackf. 299; United States *v.* Cornell, 2 Mason, 60, 91; McAdams *v.* The State, 25 Ark. 405; McKenzie *v.* The State, 26 Ark. 334; The State *v.* Decklotts, 19 Iowa, 447; Nichols *v.* Commonwealth, 11 Bush, Ky. 575.

[7] Dennison *v.* The State, 13 Ind. 510, Lanergan *v.* People, 50 Barb. 266.

[8] McMillan *v.* The State, 35 Ga. 54; Warren *v.* The State, 4 Coldw. 130; Perry *v.* The State, 43 Ala. 21; Ex parte Moore, 30 Ind. 197; Murphy *v.* The State, 31 Ind. 511; People *v.* Freel, 48 Cal. 436 Read *v.* Commonwealth, 22 Grat. 924.

[9] Vol. I. § 397 et seq.

§ 679. Secondly. *The Act viewed apart from what may be the Real Intent:* —

Concerning Technical Rules — (Intent). — In the criminal law, all acts, strictly, are referred to the intent; for, according to a doctrine already explained,[1] crime exists only in the mind. Yet the law, in many departments, has established rules to determine the mental condition; and, as applied in some circumstances, has given them an arbitrary force; so that sometimes a man who intentionally does a thing is estopped to deny the intent legally attached to the doing.[2] For various purposes, the real intent may generally, perhaps always, on a charge of crime, be inquired into; yet, in the cases to which we are now referring, the party is still precluded from denying the existence of the intent in law. And so, when a man means to do certain things, which he does, and the death of another follows, he is adjudged guilty of murder or manslaughter, whatever may be his real motive. It is to things thus intentionally done, as they concern this result, that we are now to direct our attention.

§ 680. **Using Deadly Weapons.** — As general doctrine, subject, we shall see, to some qualifications, the malice of murder is conclusively inferred from the unlawful use of a deadly weapon, resulting in death.[3]

Defined. — A deadly weapon is one likely to produce death or great bodily injury.[4] And it has been held, and it is probably the general doctrine, that the question of what is a deadly weapon is one of law for the court, not of fact for the jury.[5]

§ 681. **Whether Rule as to, is of Law or Fact.** — If there is to be a rigid rule of law on the subject, it is reasonable to hold, that, where one uses a deadly weapon without justification, he evinces

[1] Vol. I. § 287.

[2] Vol. I. § 370, 734, 735; The State *v.* Smith, 2 Strob. 77; 1 East P. C. 371; Short *v.* The State, 7 Yerg. 510.

[3] The State *v.* Smith, 2 Strob. 77; Rex *v.* Thomas, 7 Car. & P. 817; Grey's Case, J. Kel. 64; s. c. nom. Gray's Case, J. Kel. 133; Keat's Case, Skin. 666; Rex *v.* Hazel, 1 Leach, 4th ed. 368, 383; ante, § 628; United States *v.* McGlue, 1 Curt. C. C. 1; Green *v.* The State, 28 Missis. 687; Gladden *v.* The State, 12 Fla. 562; The State *v.* Mullen, 14 La. An. 570; Clem *v.* The State, 31 Ind. 480; Murphy *v.* The State, 31 Ind. 511; Head *v.* The State, 44 Missis. 731; Evans *v.* The State, 44 Missis. 762. And see Jones *v.* The State, 29 Ga. 594; The State *v.* Ferguson, 2 Hill, S. C. 619; United States *v.* Wiltberger, 3 Wash. C. C. 515; The State *v.* Sisson, 3 Brev. 58; Kriel *v.* Commonwealth, 5 Bush, 362.

[4] Stat. Crimes, § 320.

[5] Stat. Crimes, § 320; The State *v.* West, 6 Jones, N. C. 505; Commonwealth *v.* O'Brien, 119 Mass. 342; The State *v.* Rigg, 10 Nev. 284, 290. But see The State *v.* Harper, 69 Misso. 425.

a disregard for human life and safety amounting to "malice." In matter of principle, the doubt is, whether the rule should not be one of mere advice to the jury, rather than of inflexible law.[1] The author, were it for him to decide, would commit all questions of this sort to the mere advisory list; for he cannot discover by what principle either of policy or right a judge is permitted, when the law requires "malice aforethought" to constitute murder, to tell the jury that, whatever their actual belief may be, they must find the prisoner guilty of this particular "malice," provided they believe he produced death with a particular kind of weapon. And, contrary to what seems to be the doctrine of most of the cases cited to the last section, there are others which either submit to the jury[2] the question of malice, or in matter of law hold that the killing was no more than manslaughter, though a deadly weapon was used without justification.[3] Thus, —

Not used as Deadly. — If the deadly weapon is employed neither with direct aim nor in a manner likely to be deadly in the particular instance, it is not to be legally regarded in the particular instance as deadly.[4] This proposition may be viewed as resulting rather from the general course of decision than as being established directly by any express adjudication. Again. —

Careless Use. — If a person kills another by the mere careless use of a deadly weapon, he commits only manslaughter.[5]

§ 682. **Illustrations of Death from Deadly Weapon.** — Let us look at some specific instances: —

Shooting to frighten Horse. — Where the prisoner fired a pistol at a person on horseback, and the ball caused the death of another, the offence was held to be murder; though his motive was merely to frighten the horse, and cause it to throw the rider. The judge observed: "If the prisoner's object had been nothing more than to make Carter's horse throw him, and he had used

[1] See Crim. Proced. I. § 1096 et seq.; II. § 601.

[2] Ante, § 673 *a*; post, § 684.

[3] Reg. *v.* Selten, 11 Cox C. C. 674; Commonwealth *v.* Drum, 8 Smith, Pa. 9; The State *v.* Harrison, 5 Jones, N. C. 115; Philips *v.* Commonwealth, 2 Duvall, 328; Anderson *v.* The State, 3 Heisk. 86; Miller *v.* The State, 37 Ind. 432; Hurd *v.* People, 25 Mich. 405; Donnellan *v.* Commonwealth, 7 Bush, 676; Reg. *v.* Welsh, 11 Cox C. C. 336; Ex parte Wray, 30 Missis. 673.

[4] The State *v.* Roane, 2 Dev. 58; The State *v.* West, 6 Jones, N. C. 505.

[5] Reg. *v.* Noon, 6 Cox C. C. 137; The State *v.* Roane, 2 Dev. 58. Where the carelessness is insignificant in degree, his act is not indictable. Foster, 262, 265. See Vol. I. § 216

such means only as were appropriate to that end, then there would be some reason for applying to his case the distinction,[1] that, where the intent was to commit only a trespass or a misdemeanor, an accidental killing would be only manslaughter."[2]

§ 683. **Gabbett's Illustrations.** — Gabbett has collected several cases, which he states as follows. Speaking of the right to inflict —

Chastisement.[3] — He says:[4] "If the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, it will be either murder or manslaughter, according to the circumstances.[5] As where, upon a chiding between man and wife,[6] the husband struck the wife with a pestle, so that she died, it was held to be murder[7] [a case, the reader perceives, of a deadly weapon employed]; so where a woman kicked and stamped on the belly of her child [a case, in principle, of the use of a deadly weapon]; and, in another case, where a smith, upon some cross answer given by his servant, and having a piece of hot iron in his hand, ran it into the servant's belly.[8] And in Hazel's Case, where the prisoner, having employed her step-daughter, a child ten years old, to reel some yarn, and finding some of the skeins knotted, threw at the child a four-legged stool, which struck her on the temple, and caused her death soon afterwards, it was specially found by the jury that the stool was of sufficient size and weight to give a mortal blow; but it being also found, that the prisoner did not intend, at the time

[1] Post, § 694.

[2] The State *v.* Smith, 2 Strob. 77, opinion by Evans, J.

[3] Ante, § 663.

[4] 1 Gab. Crim. Law, 470, 471.

[5] 1 Hale P. C. 454; Foster, 262; ante, § 620.

[6] **Chastise Wife.** — The right of a man to inflict physical chastisement on his wife is not recognized in the United States, as it was formerly in England. Vol. I. § 891; 1 Bishop Mar. & Div. § 754–757.

[7] Dalton Just. p. 345, c. 145, § 6.

[8] Anonymous, stated J. Kel. 64. **Deadly Weapon in Chastisement.** — In Grey's Case, J. Kel. 64, the defendant, a blacksmith, had broken with a rod of iron, the skull of his servant, whom he did not mean to kill; and this was held to be murder. The judges observed: "If a father, master, or schoolmaster will correct his child, servant, or scholar, he must do it with such things as are fit for correction, and not with such instruments as may probably kill them. For otherwise, under pretence of correction, a parent might kill his child, or a master his servant, or a schoolmaster his scholar; and a bar of iron is no instrument for correction. It is all one as if he had run him through with a sword. . . . And therefore, where a master strikes his servant willingly with such things as those are, if death ensue, the law shall judge it malice prepense."

she threw it, to kill the child, it was considered to be a doubtful case, and no opinion was ever delivered by the judges." [1]

§ 684. **Weapon for Chastisement, continued.** — "And in judging of the measure and manner of the punishment, it is not only to be considered whether the weapon be a dangerous one, or likely to kill or maim, but due regard is also to be had to the age and strength of the party. As in Wigg's Case, the facts of which were, that a shepherd boy having suffered some of the sheep which he was employed in tending to escape through the hurdles of the pen, the boy's master (the prisoner) seeing the sheep get through, ran towards the boy, and, taking up a stake that was lying on the ground, threw it at him, which hit the boy, and fractured his skull, of which fracture he soon afterwards died; the jury, under the direction of Nares, J., found the prisoner guilty of manslaughter; this learned judge having in substance told them, that, if they thought the instrument so improper as to be dangerous and likely to kill or maim (the age and strength of the party killed being duly considered), the crime would amount to murder, as the law would in such case supply or presume the malicious intent; but that, if they thought the instrument, though improper for the purpose of correction, was not likely to kill or maim, the crime would only be manslaughter, unless they should also think that there was an intent to kill." [2]

§ 685. **Deadly or not, in Chastisement.** — The offence, where correction is inflicted with an instrument not deadly, but improper for correction, or with a proper instrument to an improper degree, whereby death unexpectedly ensues, is manslaughter; [3] and this proposition, compared with the doctrines of the last three sections, illustrates clearly one of the distinctions between these two classes of felonious homicide.

Malpractice of Physician. — The case of a medical man attempting to cure one, yet killing him through unskilfulness or gross carelessness, illustrates also the same distinction. If the person

[1] Rex *v.* Hazel, 1 Leach, 4th ed. 368, 1 East P. C. 236; 1 Gab. Crim. Law, 470.

[2] There was another point in the case, which might have induced the jury to return a verdict of manslaughter, rather than of murder. Rex *v.* Wiggs, 1 Leach, 4th ed. 378, note; 1 Gab. Crim. Law, 471. See also Rex *v.* Conner, 7 Car. & P. 438.

[3] Ante, § 620, 663, 682; Rex *v.* Cheeseman, 7 Car. & P. 455; Anonymous, 1 East P. C. 261; 1 Hawk. P. C. Curw. ed. p. 85, § 5.

causing death is responsible at all to the criminal law, his offence is manslaughter only;[1] because he neither intended death, nor used with the patient means which he knew were likely to put the life in peril.

§ 686. **Exposure of Dependent Persons — (Infants).** — Another illustration may be found in cases of the exposure or neglect of infants and other dependent persons;[2] if the act is one of mere negligence, not clearly showing danger to the life, yet, if death follows, the offence is only manslaughter; whereas, if the exposure or neglect is of a dangerous kind, it is murder.[3] For example, if there is an infant of tender years, and the person under obligation to supply food withholds it, whereby the child dies, this is murder.[4]

Withholding Necessaries — (Wife — Child — Servant). — But ordinarily, if a husband should deny necessaries to his wife, and she should die, — since this act is not so immediately dangerous to the life as the other, — he would be guilty only of manslaughter;[5] and perhaps a parent withholding food and the like needful things from a grown-up and competent child, might under similar circumstances be guilty to the same degree.[6] But the case of a servant-girl, sixteen years old, and not under duress, was held to be different; she being capable of making complaint and taking care of herself, those who deny her proper food are not answerable to the criminal law.[7]

Assaulting Helpless Person. — The old case of a son carrying, in a frosty and cold time, his sick father from place to place, against his will, whereby the father died, illustrates the same point, this homicide having been held to be murder.[8]

§ 687. **Other Dangerous Acts.** — And there are other acts, di-

[1] Ante, § 664, and cases there cited.

[2] Ante, § 660–662.

[3] Reg. *v.* Plummer, 1 Car. & K. 600; Reg. *v.* Crumpton, Car. & M. 597; Rex *v.* Saunders, 7 Car. & P. 277; Rex *v.* Self, 1 Leach, 4th ed. 137, 1 East P. C. 226; Reg. *v.* Renshaw, 11 Jur. 615, 616, 2 Cox C. C. 285, 20 Eng. L. & Eq. 593; Reg. *v.* Waters, Temp. & M. 57, 1 Den. C. C. 356, 13 Jur. 130, 18 Law J. N. S. M. C. 53; Reg. *v.* Marriott, 8 Car. & P. 425; United States *v.* Freeman, 4 Mason, 505; Reg. *v.* Walters, Car. & M. 164. See Reg. *v.* Middleship, 5 Cox C. C. 275.

[4] Rex *v.* Squire, 1 Russ. Crimes, 3d Eng. ed. 490; Rex *v.* Saunders, 7 Car. & P. 277.

[5] Reg. *v.* Plummer, 1 Car. & K. 600. See ante, § 662.

[6] Reg. *v.* Edwards, 8 Car. & P. 611. See Reg. *v.* Conde, 10 Cox C. C. 547.

[7] Reg. *v.* S——, 5 Cox C. C. 279.

[8] Dalton Just. c. 145, § 4. See and compare Reg. *v.* Middleship, 5 Cox C. C. 275; Reg. *v.* Knights, 2 Fost. & F. 46; Albricht *v.* The State, 6 Wis. 74; Reg. *v.* Wagstaffe, 10 Cox C. C. 530; Reg. *v.* Downes, 1 Q. B. D. 25.

rectly tending to take life, the doing of which, if death follows, is murder. Indeed, all acts having this direct tendency, and not required by any duty, appear to be of this sort; while, if their liability to cause death is more remote, the doing of them with fatal results will be only manslaughter. Therefore, —

Exposure to Small-pox. — If one confines another, even a prisoner, who has not had the small-pox, with an infected person, whereby the one confined takes it and dies, he is chargeable with murder.[1] Also, —

Necessaries for Prisoner. — It is the same if a jailer puts his prisoner in an unwholesome room, and denies him necessaries for cleanliness, whereby death is produced; he, too, is guilty of murder.[2]

§ 688. **Further Illustrations of Dangerous Acts — (Horse used to Strike — Discharging Gun — Stones from House-top).** — And Hawkins observes, that he is guilty of murder "who kills another in doing such a wilful act as shows him to be as dangerous as a wild beast, and an enemy to mankind in general; as, by going deliberately with a horse used to strike,[3] or discharging a gun among a multitude of people, or throwing a great stone or a piece of timber from a house into a street, through which he knows that many are passing;[4] and it is no excuse, that he intended no harm to any one in particular, or that he meant to do it only for sport, or to frighten the people, &c."[5] In these cases, it is perceived, the act which takes away the life is both unlawful and of a directly dangerous nature.

§ 689. **Formula of Doctrine.** — The doctrine may be stated as follows: If an act is unlawful, or is such as duty does not demand, and of a tendency directly dangerous to life, the destruction of life by it, however unintended, will be murder. But if the act, though dangerous, is not directly so, yet sufficiently dangerous to come under the condemnation of the law, and death unintended results from it, the offence is manslaughter; or, if it is one of a nature to be lawful, properly performed, and it is performed improperly, and death comes from it unexpectedly,

[1] Castell *v.* Bambridge, 2 Stra. 854, 856; ante, § 666.

[2] Rex *v.* Huggins, 2 Stra. 882, 2 Ld. Raym. 1574.

[3] See 3 Greenl. Ev. § 147.

[4] See Foster, 262, 264. And see Vol. I. § 314, 734; 1 Hawk. P. C. Curw. ed. p. 85, § 4; Foster, 262–264.

[5] 1 Hawk. P. C. Curw. ed. p. 86, § 12

the offence still is manslaughter. To continue our illustrations: —

§ 690. **Chastisement, again.** — The correction of a child by the rod is a lawful act when properly done; consequently, if the correction is excessive, the offence, when death follows, is only manslaughter, as we have already seen.[1] But a correction with a deadly weapon is never lawful, and, as we have seen,[2] it subjects to the charge of murder if death follows. So, —

Beating not in Chastisement. — "Whenever," says Hawkins, speaking of cases other than of parents and the like, "a person, in cool blood, by way of revenge, unlawfully and deliberately beats another in such a manner that he afterwards dies thereof, he is guilty of murder, however unwilling he might have been to have gone so far;"[3] because here, the reader perceives, there is no right of correction, even with a proper instrument. Yet this doctrine of Hawkins is stated a little too broadly; for, if the beating, however wrongful, was neither with a deadly weapon, nor carried to a degree evidently dangerous, and there was no intent to kill, but unfortunately death followed, the offence would amount only to manslaughter.[4]

Careless Use of Way. — Where a man uses a public highway so carelessly as to cause the death of a human being, he is guilty of manslaughter only;[5] because he had the right to make use of the way properly and carefully.[6]

§ 691. **Death from Misdemeanor.** — If one is committing a mere criminal misdemeanor, of a sort endangering human life, so that the element of danger concurs with the element of the unlawfulness of the act, the accidental causing of death is murder.[7] Therefore, —

Deadly Missiles in Riot. — Where death is unintentionally inflicted by rioters who use deadly missiles, — as where one of them

[1] Ante, § 685.

[2] Ante, § 680, 683.

[3] 1 Hawk. P. C. Curw. ed. p. 99, § 41. And see Pennsylvania *v.* Lewis, Addison, 279.

[4] The State *v.* Jarrott, 1 Ire. 76.

[5] Ante, § 667; Rex *v.* Grout, 6 Car. & P. 629; Rex *v.* Timmins, 7 Car. & P. 499; Rex *v.* Walker, 1 Car. & P. 320; Rex *v.* Swindall, 2 Car. & K. 230; Rex *v.* Green, 7 Car. & P. 156; Rex *v.* Mastin, 3 Car. & P. 396.

[6] And see Shields *v.* Yonge, 15 Ga. 349; Chrystal *v.* Commonwealth, 9 Bush, 669.

[7] Rex *v.* Plummer, J. Kel. 109, 12 Mod. 627, 631; Rex *v.* Sullivan, 7 Car. & P. 641; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227; Reg. *v.* West, 2 Car. & K. 784; People *v.* Enoch, 13 Wend. 159, 174; Ann *v.* The State, 11 Humph. 159, 163. And see Reg. *v.* Walters, Car. & M. 164; Reg. *v.* Howell, 9 Car. & P. 437.

throws a stone at random, whereby a man is killed, — all are guilty of murder.[1] And —

Abortion. — If one administers a drug to a pregnant woman, or does to her any criminal act, the object of which is merely to produce an abortion; yet, if, in consequence of this act, dangerous in its tendency, the mother dies,[2] or the child is prematurely born, and dies from the too early exposure to the external world;[3] he is guilty of murder.

Other Dangerous Misdemeanors. — Hawkins says: "If a man happen to kill another in the execution of a malicious and deliberate purpose to do him a personal hurt, by wounding or beating him; or in the wilful commission of any unlawful act, which necessarily tends to raise tumults and quarrels, and consequently cannot but be attended with the danger of personal hurt to some one or other, — as by committing a riot, robbing a park, &c., he shall be adjudged guilty of murder."[4]

§ 692. **Death from other Misdemeanors — Civil Trespass.** — The doctrine of these cases does not wholly exclude considerations of the intent. And if the act were not directly dangerous, yet done with the motive of committing a misdemeanor, the offence would be manslaughter;[5] but, if, still not being dangerous, the motive were merely the commission of a civil trespass, the unintended death would not be indictable under all circumstances, though under some it would be manslaughter. To lay down, as to this, an exact rule, sustained by authorities, seems impossible. But, to illustrate, —

[1] Rex *v.* Plummer, supra. See Rex *v.* Hodgson, 1 Leach, 4th ed. 6; Rex *v.* Hubson, 1 East P. C. 258, being s. c.; Rex *v.* Rankin, Russ. & Ry. 43; Reg. *v.* Wallis, 1 Salk. 334, 335; Mansell's Case, 2 Dy. 128 *b.*, pl. 60; The State *v.* Jenkins, 14 Rich. 215; Friery *v.* People, 2 Abb. Ap. Dec. 215. Hawkins says: "It seems clear, that, regularly, where divers persons resolve to resist all opposers in the commission of any breach of the peace, and to execute it in such a manner as naturally tends to raise tumults and affrays; as by committing a violent disseisin with great numbers of people, hunting in a park, &c.; and in so doing happen to kill a man, they are all guilty of murder; for they must at their peril abide the event of their actions who wilfully engage in such bold disturbances of the public peace, in open opposition to, and defiance of, the justice of the nation." 1 Hawk. P. C. Curw. ed. p. 101, § 51.

[2] 1 East P. C. 264; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227; ante, § 641, 657. And see Commonwealth *v.* Parker, 9 Met. 263, 265.

[3] Reg. *v.* West, 2 Car. & K. 784.

[4] 1 Hawk. P. C. Curw. ed. p. 86, § 10.

[5] Post, § 694; The State *v.* Smith, 32 Maine, 369; Reg. *v.* Packard, Car. & M. 236. And see Chichester's Case, Aleyn, 12. In these cases the act done must be *malum in se*. Vol. I. § 332. See also Rex *v.* Murphy, 6 Car. & P. 103; ante, § 620.

Discharging Gun. — When a man discharges a gun at another's fowls, in mere wanton sport, he commits, if he accidentally kills a human being, the offence of manslaughter, while his intended act is only a civil trespass;[1] and the same is the result when the firing of the gun, which produces death, is with intent simply to frighten another;[2] or when one carelessly discharges the contents of fire-arms into the street.[3]

Dangerous Act in Frolic. — And where a lad in a frolic, without meaning harm to any one, took the trap-stick out of the forepart of a cart; in consequence of which it was upset, and the carman, who was in it, putting in a sack of potatoes, was thrown backward on some stones and killed; the lad was held to be guilty of manslaughter.[4]

§ 693. **Frolic Dangerous or not — Misdemeanor or not.** — In the cases mentioned in the last section, the thing done was of dangerous tendency, but not directly dangerous. And so it has been laid down, that, where a fatal blow is "inflicted in sport, under circumstances not of themselves calculated to produce personal injury;" if death follows accidentally, the thing is not indictable even as manslaughter.[5] Yet this doctrine must be qualified to the extent, that an assault and battery, or other criminal misdemeanor, was not intended; because, if such was the intent, the killing will be either murder or manslaughter, according to the circumstances.[6] But, —

Physic in Sport. — Giving one physic in sport, if it kills him, is manslaughter.[7]

[1] Vol. I. § 334; 1 East P. C. 255. **Shooting Game.** — But ordinarily, if one, shooting at game, accidentally kills a man, he is not indictable. Says East: "If an act, not unlawful in itself, as shooting at game, be prohibited to be done unless by persons of a certain description, the case of a person not coming under that description, offending against such statute and in so doing unfortunately killing another, will fall under the same rule as that of a qualified man, and must equally be attributed to misadventure." 1 East P. C. 260. And see Vol. I. § 330–332.

[2] The State *v.* Roane, 2 Dev. 58.

[3] People *v.* Fuller, 2 Parker C. C. 16.

[4] Rex *v.* Sullivan, 7 Car. & P. 641. And see, as to where one covers another with straw, and sets fire to it; if the intent is to do a serious bodily harm, and death follows, the offence is murder; if merely to frighten, it is manslaughter. Errington's Case, 2 Lewin, 217.

[5] Reg. *v.* Conrahy, 2 Crawf. & Dix C. C. 86. And see Rex *v.* Waters, 6 Car. & P. 328.

[6] And see Reg. *v.* Packard, Car. & M. 236; Gore's Case, 9 Co. 81 *a*. In the latter of these cases it is said: **Poison laid for Vermin.** — "If one prepares ratsbane to kill rats and mice, or other vermin, and leaves it in certain places, to that purpose, and with no ill intent, and one finding it eats it, it is not felony, because he who prepares the poison has no ill or felonious intent."

[7] 1 East P. C. 264.

By Servant contrary to Command. — And in the time of slavery the same was held where a slave administered to a child, "contrary to a general command not to give the child any thing whatever," a dose of laudanum resulting in death, while the intent of the slave was to produce a mere harmless sleep.[1]

Whip Horse. — One who whips a horse on which another is riding, so that the animal springs out and runs over a child whom it kills, is guilty of manslaughter; but the person on the horse, not having done wrong intentionally, escapes punishment.[2]

§ 694. Thirdly. *The Act which distinguishes Murder from Manslaughter viewed in Combination with the Intent:* —

Some other Offence Meant. — Though the intent of the wrongdoer is not to take human life, and the thing which he does is not of the dangerous sort contemplated in the last few paragraphs, still, by accident, it may result in death. And if it does, and if the thing intended was *malum in se* and indictable, whether as felony or misdemeanor, a discussion in our first volume shows that a felonious homicide is committed.[3] As to whether the homicide is murder or manslaughter, —

Felony Meant. — It is a common and plain rule, that, whenever one does an act with the design of committing any felony, though not a felony dangerous to human life, yet, if the life of another is accidentally taken, his offence is murder.[4] In the application of this rule, statutory felonies are the same as felonies at the common law.[5]

Misdemeanor Meant. — On the other hand, still supposing the thing done not to be of dangerous tendency, the offence, when death accidentally follows the commission of a misdemeanor, is, as we have seen,[6] manslaughter.

§ 695. **The Killing intended.** — Where the killing is intended, and is not lawful, it is generally murder;[8] but, under circum

[1] Ann *v.* The State, 11 Humph. 159. And see Rex *v.* Martin, 3 Car. & P. 211; Sarah *v.* The State, 28 Missis. 267.

[2] 1 Hawk. P. C. Curw. ed. p. 85, § 3; 1 Hale P. C. 486; ante, § 620.

[3] Vol. I. § 323–336.

[4] Vol. I. § 332; 1 Hawk. P. C. Curw. ed. p. 86, § 11, p. 100, § 44; 1 East P. C. 255; Gore's Case, 9 Co. 81 *a*; Rex *v.* Plummer, J. Kel. 109, 12 Mod 627, 631; The State *v.* Shelledy, 8 Iowa, 477. See Commonwealth *v.* Hanlon, 3 Brews. 461 Reg. *v.* Greenwood, 7 Cox C. C. 464 Alfred *v.* The State, 33 Ga. 303; pos., § 721.

[5] The State *v.* Smith, 32 Maine, 369; The State *v.* McNab, 20 N. H. 160. And see Stat. Crimes, § 139.

[6] Ante, § 691–693.

[7] Ante, § 670.

[8] Commonwealth *v.* Drew, 4 Mass. 391; The State *v.* Anderson, 2 Tenn. 6

stances of provocation, or of mutual combat, it may be reduced to manslaughter.[1] If the law authorizes or permits it, there is no crime. To render an intentional killing murder, there is no need that the intent to take life should have existed any particular time before the act is performed.[2]

§ 696. **Unlawful Act, for Mischief — Heedless.** — Foster states a distinction as follows: "If an action, unlawful in itself, be done deliberately, and with intention of mischief or great bodily harm to particulars; or of mischief indiscriminately, fall it where it may; and death ensue against or beside the original intention of the party, it will be murder. But if such mischievous intention doth not appear, which is matter of fact and to be collected from circumstances, and the act was done heedlessly and incautiously, it will be manslaughter; not accidental death, because the act upon which death ensued was unlawful."[3] A heedless, unlawful omission of duty is the following: —

Neglect at Colliery. — One who was walling the inside of a shaft in a colliery, under the duty to place a stage on the mouth of the shaft, neglected to do it, and a life was lost. This was held to be manslaughter. Lord Campbell, C. J., observed: "If the prisoner, of malice aforethought and with the premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. . . . It has never been doubted, that, if death is the direct consequence of the malicious omission of the performance of a duty (as of a mother to nourish her infant child), this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter. . . . The general doctrine seems well established, that what constitutes murder, being by design and of malice prepense, constitutes manslaughter when arising from culpable negligence."[4]

The State *v.* Hildreth, 9 Ire. 429; The State *v.* Johnson, 1 Ire. 354; Ex parte Wray, 30 Missis. 673.

[1] Ante, § 676. And see The State *v.* Hill, 4 Dev. & Bat. 491, 496; post, § 697.

[2] Mitchum *v.* The State, 11 Ga. 615; People *v.* Clark, 3 Seld. 385; Green *v.* The State, 13 Misso. 382; United States *v.* Cornell, 2 Mason, 60, 91; Shoemaker *v.* The State, 12 Ohio, 43; Rex *v.* Legg, J. Kel. 27; ante, § 677; post, § 728; Donnelly *v.* The State, 2 Dutcher, 601; The State *v.* Shoultz, 25 Misso. 128 People *v.* Moore, 8 Cal. 90.

[3] Foster, 261. See ante, § 685, 686.

[4] Reg. *v.* Hughes, Dears. & B. 248, 7 Cox C. C. 301. And see ante, § 659–669, 692, 693.

§ 697. Fourthly. *The Act which distinguishes Murder from Manslaughter viewed in Connection with the Conduct of the Person killed, as exciting the Passions, or otherwise:* —

Passion and Malice distinguished. — The "malice aforethought" of the law implies a mind under the sway of reason. "Passion" and "malice" are deemed to be inconsistent motive powers; so that, if an act proceeds from the one, it does not also proceed from the other.[1]

Killing in Passion. — If an act of killing, prompted by malice, would be murder, it is only manslaughter when it springs from passion, because there is no "malice aforethought."[2]

How intense the Passion. — The sufficiency of the passion to take away malice, and reduce what would be murder to manslaughter, is so much a question of law, that it is difficult to say, on the authorities, how intense, in fact, it must be. Said Gaston, J., in a North Carolina case: "We nowhere find, that the passion which in law rebuts the imputation of malice must be so overpowering as for the time to shut out knowledge and destroy volition. All the writers concur in representing this indulgence of the law to be a condescension to the frailty of the human frame, which, during the *furor brevis*, renders a man deaf to the voice of reason, so that, although the act done was intentional of death, it was not the result of malignity of heart, but imputable to human infirmity."[3] The passion must be such as is sometimes called irresistible;[4] yet it is too strong to say, that "the reason of the party should be dethroned," or he should act "in a whirlwind of passion." There must be sudden passion, upon reasonable provocation, to negative the idea of malice.[5]

Cause for Passion. — And, to reduce to manslaughter, it must proceed from what the law deems adequate cause.[6]

§ 698. **Manslaughter without Passion.** — There are cases, not of excited passion, wherein the conduct of the person slain has been such as to make the killing, though in cool blood, manslaughter when otherwise it would be murder. Thus, —

[1] Post, § 718, note.

[2] Preston *v.* The State, 25 Missis. 383; Murphy *v.* The State, 31 Ind. 511; Stokes *v.* The State, 18 Ga. 17; Commonwealth *v.* Whitler, 2 Brews. 388; People *v.* Milgate, 5 Cal. 127; The State *v.* Johnson, 3 Jones, N. C. 266.

[3] The State *v.* Hill, 4 Dev. & Bat. 491, 496. And see Haile *v.* The State, 1 Swan, Tenn. 248.

[4] People *v.* Freeland, 6 Cal. 96.

[5] Young *v.* The State, 11 Humph. 200.

[6] Smith *v.* The State, 49 Ga. 482.

Self-defence. — Considerations of passion aside, one assaulted may, we have seen,[1] strike back in self-defence; yet may not[2] take the assailant's life. Still, as he had the right to strike, principles already unfolded[3] show, that, if by too great severity or other accident the blow produces death unintended, he commits only manslaughter, unless the weapon is deadly or there is some other like circumstance. Now, —

§ 699. **More exactly.** — The books are not quite clear how much further the leniency of the law extends. In the facts of most cases, the passion of the asaulted person is excited; then, his mind being thus clouded, if he kills his adversary though with a deadly weapon, his offence is only manslaughter.[4] Yet, should his resistance with a deadly weapon be made in a very cruel manner, not at all justified by the nature of the assault, the inference will be more or less stringent according to the circumstances that malice, not passion, impelled the blow, making his crime murder.[5] If it really sprang from passion, the offence will still be manslaughter.[6] Again, —

Illegal Arrest. — One who, excited in resisting the outrage of an illegal arrest, kills the aggressor with a deadly weapon, commits only manslaughter,[7] unless acting from express malice.[8]

[1] Vol. I. § 850, 863–867; ante, § 41.

[2] Vol. I. § 867.

[3] Ante, § 681, 685, 686, 689, 690.

[4] Rex *v.* Thomas, 7 Car. & P. 817; Rex *v.* Snow, 1 East P. C. 244, 1 Leach, 4th ed. 151; Holly *v.* The State, 10 Humph. 141; The State *v.* Curry, 1 Jones, N. C. 280; Yates *v.* People, 32 N. Y. 509; Underwood *v.* The State, 25 Texas, Supp. 389; Judge *v.* The State, 58 Ala. 406. See Roberts *v.* The State, 14 Misso. 138; Jones *v.* The State, 14 Misso. 409; Rex *v.* Ayes, Russ. & Ry. 166.

[5] Rex *v.* Lynch, 5 Car. & P. 324; The State *v.* Craton, 6 Ire. 164; The State *v.* Curry, 1 Jones, N. C. 280. And see Rex *v.* Thomas, 7 Car. & P. 817; Rex *v.* Willoughby, 1 East P. C. 288; Rex *v.* Shaw, 6 Car. & P. 372; Rex *v.* Thomas, 1 Russ. Crimes, 3d Eng. ed. 614; The State *v.* Scott, 4 Ire. 409; Rex *v.* Hayward, 6 Car. & P. 157; Rex *v.* Mason, 1 East P. C. 239; Rex *v.* Longden, Russ. &. Ry. 228; King *v.* Commonwealth, 2 Va. Cas. 78; Holland *v.* The State, 12 Fla. 117; The State *v.* Hargett, 65 N. C. 669; The State *v.* Boon, 82 N. C. 637; People *v.* Perdue, 49 Cal. 425. But see Patterson *v.* The State, 66 Ind. 185.

[6] Judge *v.* The State, supra. See The State *v.* White, 30 La. An. 364. In the former case, the court below had charged the jury in the very words of a sentence taken from the old 3d ed. of this work, and they were held to be too broad. In the book, they were restricted by their connection; and, in later editions, not before the court, I had added in terms the exact limitation which the judge said they needed. I regret the ambiguity. I am not aware, nor do I believe, that, in any other case, any court has been misled by an error or ambiguity of mine, though doubtless I have committed many.

[7] Ante, § 652; Rex *v.* Davis, 7 Car. & P. 785; Reg. *v.* Tooley, 11 Mod. 242; Rex *v.* Thompson, 1 Moody, 80; Rex *v.* Delcany, Jebb. 88; Roberts *v.* The State, 14 Misso. 138; Jones *v.* The State, 14 Misso. 409; Reg. *v.* Carey, 14 Cox C. C. 214; Rafferty *v.* People, 69 Ill. 111.

[8] Rafferty *v.* People, supra.

Passions not excited. — But how is it if the passions are not excited by the outrage? The books lay down the doctrine in the very broad terms, that a homicide in resisting an unlawful arrest is manslaughter and not murder,[1] even though committed by the use of a deadly weapon,[2] — a proposition possibly admitting some qualification on the authorities.[3] The true view of the law, in reason, is, that, where the mere fact of an illegal arrest attempted or consummated appears, if the one suffering it kills the officer or other arresting person whether with a deadly weapon or by any other means, he may rely on the presumption that his mind was clouded by passion, reducing the homicide to manslaughter. But, in these cases, as in others to be considered further on, if actual malice is affirmatively proved, the homicide will be murder. The doctrines of this section and the last should be studied in connection with what is said in the first volume on the "Defence of Person and Property,"[4] and in the work on Criminal Procedure on "The Arrest."[5]

§ 700. **Excited Passion, again.** — Returning to those cases in which the passion is excited, we should bear in mind that the mere excitement will not necessarily reduce the killing to manslaughter; the cause of the excitement must be one which the law deems adequate, and the killing must in fact proceed from it, not from independent malice.

How the Topic divided. — We shall, therefore, inquire, 1. Under what circumstances the excitement of the passions will be deemed to have proceeded from an adequate cause, to reduce the killing to manslaughter; 2. Under what circumstances, though the passions were excited, the killing will be regarded as originating in independent malice, rendering it murder.

§ 701. 1. *Adequacy of the Cause of Excitement:* —

How the Rule ascertained. — Under this head, it is best that we begin with illustrations, and derive the rule, if any can be found, as we proceed.

[1] Vol. I. § 868; Rex *v.* Withers, 1 East P. C. 295; Hoye *v.* Bush, 2 Scott, N. R. 86, 1 Man. & G. 775; Rex *v.* Curvan, 1 Moody, 132; Rex *v.* Gordon, 1 East P. C. 315; Commonwealth *v.* McLaughlin, 12 Cush. 615.

[2] Rex *v.* Hood, 1 Moody, 281; Rex *v.* Davis, 7 Car. & P. 785; Rex *v.* Patience, 7 Car. & P. 775; Rex *v.* Thompson, 1 Moody, 80; The State *v.* Oliver, 2 Houston, 585.

[3] Galvin *v.* The State, 6 Coldw. 283; Brooks *v.* Commonwealth, 11 Smith, Pa. 352.

[4] Vol. I. § 836 et seq.

[5] Crim. Proced. I. § 155 et seq. See, also, post, § 703–705.

Sudden Quarrel. — A common case is where two persons, upon a sudden quarrel, engage in mutual combat; then, if either one, in the heat of it, kills the other, though with a deadly weapon, the offence is, in most circumstances, only manslaughter.[1] But if there is special atrocity in the killing, or if otherwise it appears to be the result of deliberative malice rather than passion, it is murder.[2] When the combat has become mutual, it ordinarily ceases to be of importance by which party the first blow was given.[3] And, as we have seen,[4] it makes no difference though the blow which proved fatal was, while prompted by the heat of the fight, inflicted with the intent to take life.[5]

§ 702. **Quarrel, continued.** — Still, in the facts of a particular case, it may be of importance to inquire by which party the fight was begun, and whether or not the fatal blow was meant to take

[1] Rex *v.* Snow, 1 Leach, 4th ed. 151, 1 East P. C. 244; Commonwealth *v.* Biron, 4 Dall. 125; Allen *v.* The State, 5 Yerg. 453; The State *v.* Roberts, 1 Hawks, 349; Rex *v.* Ayes, Russ. & Ry. 166; Rex *v.* Rankin, Russ. & Ry. 43; United States *v.* Mingo, 2 Curt. C. C. 1; The State *v.* Massage, 65 N. C. 480; Cotton *v.* The State, 31 Missis. 504. See post, § 703 and note.

[2] Thus, if two persons fight, and one overpowers the other and knocks him down, and puts a rope round his neck and strangles him, this is murder. "The act is so wilful and deliberate that nothing can justify it." Rex *v.* Shaw, 6 Car. & P. 372. See Commonwealth *v.* Crane, 1 Va. Cas. 10; King *v.* Commonwealth, 2 Va. Cas. 78; The State *v.* Scott, 4 Ire. 409; Shorter *v.* People, 2 Comst. 193; ante, § 662. Hawkins says: "It hath been adjudged, that, even upon a sudden quarrel, if a man be so far provoked by any bare words or gestures of another as to make a push at him with a sword, or strike at him with any such weapon as manifestly endangers his life, before the other's sword is drawn, and thereupon a fight ensue, and he who made such assault kill the other, he is guilty of murder; because that by assaulting the other in such an outrageous manner, without giving him an opportunity to defend himself, he showed that he intended, not to fight with him, but to kill him, which violent revenge is no more excused by such a slight provocation than if there had been none at all. But it is said, that, if he who draws upon another in a sudden quarrel make no pass at him till his sword is drawn, and then fight with him and kill him, he is guilty of manslaughter only; because that by neglecting the opportunity of killing the other, before he was on his guard, and in a condition to defend himself with a like hazard to both, he showed that his intent was not so much to kill as to combat with the other, in compliance with those common notions of honor, which prevailing over reason during the time that a man is under the transports of a sudden passion, so far mitigate his offence in fighting that it shall not be adjudged to be of malice prepense. And if two happen to fall out upon a sudden, and presently agree to fight, and each of them fetch a weapon, and go into the field, and there one kill the other, he is guilty of manslaughter only; because he did it in the heat of blood." 1 Hawk. P. C. Curw. ed. p. 97, § 27–29.

[3] The State *v.* Floyd, 6 Jones, N. C. 392. But see post, § 702.

[4] Ante, § 676.

[5] And see Quarles *v.* The State, 1 Sneed, 407; Rex *v.* Taylor, 5 Bur. 2793; Rex *v.* Snow, 1 Leach, 4th ed. 151.

life. The one, for example, who begins a quarrel stands throughout on a somewhat different ground from the other, unless the latter puts himself equally in the wrong by a defence which he has no right to make. Indeed, in some cases of this sort, the beginner occupies only the position of an assailant throughout the combat, however long continued. Thus, —

Assault by the Deceased. — If, without provocation, a man draws his sword upon another, who draws in defence; whereupon they fight, and the first slays his adversary; his crime is murder.[1] For he who seeks and brings on a quarrel cannot, in general, avail himself of his own wrong in defence.[2] But where an assault, which is neither calculated nor intended to kill, is returned by violence beyond what is proportionate to the aggression, the character of the combat is changed; and, if, without time for his passion to cool, the assailant kills the other, he commits only manslaughter.[3]

§ 703. **Continued.** — Though the passion excited by an assault may reduce to manslaughter the killing of the assailant:[4] yet it may be so trivial, or inflicted under such circumstances, that the taking of life, in resistance of it, will be murder.[5] Thus, —

Slight Blow — Wife on Husband. — A learned judge observed, that, "if a man should kill a woman or a child for a slight blow, the provocation would be no justification;[6] and," he added, a

[1] Hugget's Case, J. Kel. 59, 61; Anonymous, J. Kel. 58; The State *v.* Hill, 4 Dev. & Bat. 491; Reg. *v.* Mawgridge, J. Kel. 119, 125, 126; 1 Hawk. P. C. Curw. ed. p. 87, § 18. See Williams *v.* People, 54 Ill. 422.

[2] The State *v.* Linney, 52 Misso. 40; The State *v.* Underwood, 57 Misso. 40; The State *v.* Starr, 38 Misso. 270; People *v.* Lamb, 17 Cal. 323.

[3] The State *v.* Hill, 4 Dev. & Bat. 491. And see The State *v.* Curry, 1 Jones, N. C. 280; post, § 704 and note.

[4] Ante, § 699. And compare with § 698.

[5] 1 East P. C. 234; Commonwealth *v.* Mosler, 4 Barr, 264; Reg. *v.* Sherwood, 1 Car. & K. 556; Rex *v.* Lynch, 5 Car. & P. 324. And see Shorter *v.* People, 2 Comst. 193. In Selfridge's Case, Whart. Hom. 417, 418, Parsons, C. J., said, in charging the grand jury: "Any assault, made not lightly, but with violence, or with circumstances of indignity, upon a man's person, if it be resented immediately, and in the heat of blood by killing the party with a deadly weapon, is a provocation which will reduce the crime to manslaughter; unless the assault was sought by the party killing, and induced by his own act, to afford him a pretence for wreaking his malice." See also Foster, 291.

[6] In Stedman's Case, cited Foster, 292, Holt, C. J., was of opinion, that a box on a soldier's ear from a woman would not reduce to manslaughter his act of killing her by a blow with the pommel of his sword; but otherwise, when she struck him in the face with an iron patten, drawing a great deal of blood.

doubt might be entertained "whether any blow, inflicted by a wife on a husband, would bring the killing of her below murder."[1]

Assault without Battery. — But there are cases in which an assault, without a battery, will suffice.[2] If one merely intends to commit an assault, but abandons his purpose before coming sufficiently near his adversary to perpetrate it, the latter, by inflicting death, becomes guilty of murder.[3]

Battery. — A battery need not, to reduce the killing in defence to manslaughter, be such as endangers life.[4]

§ 704. **Words — Threat.** — But no words, however provoking or insulting, or mere verbal threat, will so far justify a blow returned, though in actual passion, as to reduce the killing to the lower degree.[5] It is plain, however, that words may give character to acts;[6] and, in matter of evidence, are admissible to explain them.[7] Hence if there is a present demonstration of impending violence, which alone would be insufficient, accompanying words, added to the physical acts, may create such peril as will justify the killing of the aggressor, or reduce it to manslaughter.[8] Again, it appears to be a doctrine of the courts, that, if parties become excited by words, and one of them attempts to chastise the other with a weapon not deadly, he will

[1] Commonwealth *v.* Mosler, supra, Gibson, C. J.

[2] Vol. I. § 872, 873. And see Ray *v.* The State, 15 Ga. 223.

[3] Copeland *v.* The State, 7 Humph. 479. And see Pritchett *v.* The State, 22 Ala. 39; Vol. I. § 843, 844, 873.

[4] The State *v.* Sizemore, 7 Jones, N. C. 206.

[5] Vol. I. § 872; 1 Hawk. P. C. Curw. ed. p. 98, § 33; Beauchamp *v.* The State, 6 Blackf. 299; The State *v.* Barfield, 8 Ire. 344; The State *v.* Scott, 4 Ire. 409; Felix *v.* The State, 18 Ala. 720; Morely's Case, J. Kel. 53, 55, 65; s. c. nom. Morley's Case, 6 Howell St. Tr. 769, 771; Rex *v.* Keate, Comb. 406, 407; Keat's Case, Holt, 481, Skin. 666; The State *v.* Merrill, 2 Dev. 269; Mawgridge's Case, 17 Howell St. Tr. 57, 66; Hawkins *v.* The State, 25 Ga. 207; Rapp *v.* Commonwealth, 14 B. Monr. 614; Taylor *v.* The State, 48 Ala. 180; Reg. *v.* Rothwell, 12 Cox C. C. 145, 2 Eng. Rep. 201; Dawson *v.* The State, 33 Texas, 491; Myers *v.* The State, 33 Texas, 525; The State *v.* Hall, 9 Nev. 58; The State *v.* Ferguson, 9 Nev. 166; The State *v.* Stewart, 9 Nev. 120; Malone *v.* The State, 49 Ga. 210; Evans *v.* The State, 44 Missis. 762; Hughey *v.* The State, 47 Ala. 97; Harris *v.* The State, 47 Missis. 318; Edwards *v.* The State, 47 Missis. 581; Stoneman *v.* Commonwealth, 25 Grat. 887. See United States *v.* Wiltberger, 3 Wash. C. C. 515; Jackson *v.* The State, 45 Ga. 198.

[6] Ante, § 34, 40.

[7] The State *v.* Keene, 50 Misso. 357; Pridgen *v.* The State, 31 Texas, 420.

[8] Williams *v.* The State, 3 Heisk. 376; Reg. *v.* Sherwood, 1 Car. & K. 556; The State *v.* Bonds, 2 Nev. 265; Myers *v.* The State, 33 Texas, 525; Coker *v.* The State, 20 Ark. 53; Reg. *v.* Smith, 4 Fost. & F. 1066; Reg. *v.* Rothwell, 12 Cox C. C. 145, 2 Eng. Rep. 201; Hurd *v.* People, 25 Mich. 405; Mitchell *v.* The State, 41 Ga. 527.

be held only for manslaughter, though death is unintentionally inflicted.[1] Hale even says, it was held in Morley's Case, "that words of menace of bodily harm would come within the reason of such a provocation as would make the offence to be but manslaughter;"[2] but this proposition, while contrary to modern cases cited to this section, is hardly reconcilable with some other established doctrines.[3]

§ 705. **Difficult to find and state an exact Rule.** — The reader perceives that the foregoing discussions, if such they may be called, contain but little of *doctrine;* being in the main enunciations of what the courts have found, sitting, almost like jurors, in determination upon particular facts. If, below this outward seeming, there lies a science, harmonizing, in the nature of a rule, these several determinations, it would be pleasant to uncover the rule, and present it, in words, to the reader. Perhaps it would be, that, when the facts evince a certain degree of culpa-

[1] 3 Greenl. Ev. § 124; Foster, 290, 291; J. Kel. 131; Watts *v.* Brains, Cro. Eliz. 778; Mawgridge's Case, 17 Howell St. Tr. 57, 62. This doctrine may probably be accepted; but, in the facts of cases of this kind, words usually terminate in a mutual combat, reducing the killing to manslaughter on grounds already mentioned. In The State *v.* Hill, 4 Dev. & Bat. 491, 497, Gaston, J., observed: "The general rule of law is, that words of reproach, or contemptuous gestures, or the like offences against decorum, are not a sufficient provocation to free the party killing from the guilt of murder, when he useth a deadly weapon, or manifests an intention to do great bodily harm. This rule, however, does not obtain where, because of such insufficient provocation, the parties become suddenly heated, and engage immediately in mortal combat, fighting upon equal terms." And Lord Hale says, that, in Morley's Case, 1 Hale P. C. 456, 6 Howell St. Tr. 769; s. c. nom. Morely's Case, J. Kel. 53, "many who were of opinion that bare words of slighting, disdain, or contumely would not of themselves make such a provocation as to lessen the crime into manslaughter, yet were of this opinion, that, if A gives indecent language to B, and B thereupon strikes A, but not mortally; and then A strikes B again, and then B kills A; this is but manslaughter. For the second stroke made a new provocation, and so it was but a sudden falling out; and, though B gave the first stroke, and after a blow received from A, B gives him a mortal stroke, this is but manslaughter, according to the proverb, *the second blow makes the affray.* And this was the opinion of myself and some others." So in this case of Morely, as see J. Kel. 53, 55; s. c. nom. Morley's case, 6 Howell St. Tr. 769, 771, it was agreed, that, "if upon ill words both of the parties suddenly fight, and one kill the other, this is but manslaughter; for it is a combat betwixt two upon a sudden heat, which is the legal description of manslaughter." In Felix *v.* The State, 18 Ala. 720, the doctrine seems to be laid down broadly, that "provocation by words will never reduce the killing to manslaughter." And see Ray *v.* The State, 15 Ga. 223; Rex *v.* Snow, 1 East P. C. 244, 1 Leach, 4th ed. 151; Rex *v.* Thomas, 7 Car. & P. 817; Holly *v.* The State, 10 Humph. 141; Commonwealth *v.* Crane, 1 Va. Cas. 10; The State *v.* Scott, 4 Ire. 409.

[2] Morley's Case, 1 Hale P. C. 456. A doctrine analogous prevails in the matrimonial law. 1 Bishop Mar. & Div. § 729.

[3] Vol. I. § 872, 873

bility, they constitute the "malice aforethought" of the old statute, and the killing is murder; while, when they come short, it is manslaughter. But there are no words, other than these obscure ones of the old statute, to express the degree; therefore it can be shown to the reader only by such illustrations as are set down in these pages.

§ 706. **Defence of Property.**[1] — The books appear to lay down the doctrine, that, though the passions become excited in the mere defence of property, other than the dwelling-house, a killing with a deadly weapon used in such defence, or other like dangerous means, is murder,[2] — a doctrine, however, which demands further judicial consideration. When, in the defence of property, the weapon is not deadly, the accidental killing will not exceed manslaughter.[3]

§ 707. **Defence of the Castle.** — The defence of the dwelling-house stands on a different ground. And though the question has at some periods of our law been in part under a cloud, it may now be deemed to be reasonably clear, that, to prevent an unlawful entrance into a dwelling-house, the occupant may make defence to the taking of life, without being liable even for manslaughter.[4] Of course, a defence may be of a sort which will constitute manslaughter, or even murder.[5]

[1] Vol. I. § 836 et seq.

[2] See cases cited Vol. I. § 857, 861, 862, 875, 876; and particularly Commonwealth *v.* Drew, 4 Mass. 391; The State *v.* Zellers, 2 Halst. 220; Carroll *v.* The State, 23 Ala. 28; Commonwealth *v.* Green, 1 Ashm. 289, 297; McDaniel *v.* The State, 8 Sm. & M. 401; Roberts *v.* The State, 14 Misso. 138; The State *v.* Morgan, 3 Ire. 186; Kunkle *v.* The State, 32 Ind. 220; 1 Hawk. P. C. Curw. ed. 98, § 33, 34, 36. The doctrine that passion excited by a trespass to mere property can never reduce the killing with a deadly weapon to manslaughter, is too hard for human nature; and, though stated many times in the books, is not sufficiently founded in actual adjudication to be received without further examination. For surely, although a man is not so quickly excited by an attack on his property as on his person, and therefore the two cases are not on precisely the same foundation, yet, since he has the right to defend his property by all means short of such as produce death, if, in the heat of passion arising during a lawful defence, he seizes a deadly weapon, and with it unfortunately takes the aggressor's life, every principle which in other cases dictates the reduction of the crime to the mitigated form, requires the same in this case. When a *felony* against the property is attempted, — as see Vol. I. § 849, and the other sections there referred to, — the defender of it may take life, if he is in passion, or even, when necessary, in cool blood; without, according to all the cases, being holden for murder; without, according to the true doctrine, being at all responsible.

[3] 1 Hale P. C. 473; Foster, 291; ante, § 689, 690; Reg. *v.* Archer, 1 Fost. & F. 351, Reg. *v.* Wesley, 1 Fost. & F. 528. See The State *v.* Burwell, 63 N. C. 661.

[4] Vol. I. § 858, 859.

[5] See the authorities cited in the last

§ 708. **Other Classes of Cases.** — There are other cases in which, where the passion becomes excited by the conduct of the person killed, the law regards tenderly a homicide committed by the excited one, and makes it only manslaughter. Thus, —

Wife caught in Adultery — Son, in Sodomy. — If a husband finds his wife committing adultery, and, provoked by the wrong, instantly takes her life, or the adulterer's;[1] or, if a father detects one in the commission of the crime against nature with his son, and immediately avenges the wrong by the death of the wrong-doer;[2] the homicide is only manslaughter. But if, on merely hearing of the outrage, he pursues and kills the offender, he commits murder.[3] The distinction rests on the greater tendency of seeing the passing fact, than of hearing of it when accomplished, to stir the passions: and, if a husband is not actually witnessing the wife's adultery, but knows it is transpiring; and, in an overpowering passion, no time for cooling having elapsed, he kills the wrong-doer; the offence is reduced to manslaughter.[4] A man

section. And see Vol. I. § 858, 859. In an Alabama case, this question was considered; and, though the result does not appear to me either so clear or so satisfactory as the general course of the decisions of that tribunal might lead us to anticipate, I presume the reader will like to see it stated in the words of the judge. He said: "Our conclusion is, that a mere civil trespass upon a man's house, unaccompanied by such force as to make it a breach of the peace, would not be a provocation which would reduce the killing to manslaughter, if it was done under circumstances from which the law would imply malice, as with a deadly weapon. For trespass with force it may be murder or manslaughter, according to the circumstances. The owner may resist the entry, but he has no right to kill, unless it be rendered necessary, to prevent a felonious destruction of his property, or to defend himself against loss of life, or great bodily harm. If he kills when there is not a reasonable ground of apprehension of immediate danger to his person, or property, it is manslaughter; and, if done with malice express or implied, it is then murder." Carroll *v.* The State, 23 Ala. 28, 36. And see Greschia *v.* People, 53 Ill. 295; Temple *v.* People, 4 La. s. 119; Cook's Case, Cro. Car. 537.

[1] 1 Hawk. P. C. Curw. ed. p. 98, § 36; Foster, 298; Reg. *v.* Kelly, 2 Car. & K. 814; Pearson's Case, 2 Lewin, 216; The State *v.* John, 8 Ire. 330; The State *v.* Samuel, 3 Jones, N. C. 74; Commonwealth *v.* Whitler, 2 Brews. 388.

[2] Reg. *v.* Fisher, 8 Car. & P. 182.

[3] The State *v.* Neville, 6 Jones, N. C. 423; Sawyer *v.* The State, 35 Ind. 80. In one case of this kind, where the facts were undisputed, and the judge distinctly told the jury that the killing was murder, they returned a verdict of manslaughter; thereby illustrating the truth, that the hard places of the law are practically softened by the humanity of jurors. Reg. *v.* Fisher, 8 Car. & P. 182. And see, as to the text, McWhirt's Case, 3 Grat. 594. In Maher *v.* People, 10 Mich. 212, the doctrine is less severe against defendants than as stated in the

[4] The State *v.* Holme, 54 Misso. 153, 166. See Biggs *v.* The State, 29 Ga. 723; Cheek *v.* The State, 35 Ind. 492.

who is only the husband's agent to detect the wife's adultery, commits murder when he kills her or the paramour whom he has caught in the act.[1] And equally does the husband, if the killing is from prior malice, not the engendered passion.[2]

§ 709. **Avenging Crime.** — Where one, having his pocket picked, seized the thief, and being encouraged by a concourse of people threw him into an adjoining pond to avenge the theft by ducking him; whereupon, contrary to expectation, he was unfortunately drowned; the homicide was held to be manslaughter only.[3]

§ 710. **Test as to Sufficiency of Provocation.** — To determine whether or not the conduct of the person killed was a provocation reducing the killing to manslaughter, the test is, not whether what he did is indictable, but whether the law deems it calculated to excite passions beyond control.[4] Said a learned judge: "A libel is not only a civil injury, but a public offence; yet the law will not consider it a provocation extenuating the slaying of the libeller into manslaughter, although the deed may have been committed in the *first* gust of passion. Adultery is not an indictable offence;[5] yet, of all the provocations which can excite man to madness, the law recognizes it as the highest and strongest."[6]

§ 711. **Passion subsided.** — If, in a particular case, there has been passion, but it was ended when the homicide occurred, it cannot reduce the killing to a lower degree.[7] Beyond this, —

Cooling Time. — If the passion had time to cool, the offence is not reduced to the lower degree, though in fact it had not cooled.[8] For "when anger, provoked by a cause sufficient to mitigate an instantaneous homicide, has been continued beyond the time

text. Again, a man suspecting adultery followed his wife, and found her talking with her paramour; she ran off, but the latter remained. He fell on him with a stone and knife, inflicting wounds which produced death; and it was held that the offence was murder. The State *v.* Avery, 64 N. C. 608.

[1] People *v.* Horton, 4 Mich. 67.

[2] Shufflin *v.* People, 62 N. Y. 229.

[3] Rex *v.* Fray, 1 East P. C. 236; 1 Hawk. P. C. Curw. ed. p. 99, § 38. **Provocation by Children, Servants, &c.** — As to passion created by the acts of children, servants, and the like, see Keat's Case, Holt, 481, Skin. 666; Rex *v.* Hazel, 1 East P. C. 236, 1 Leach, 4th ed. 368; Rex *v.* Wiggs, 1 Leach, 4th ed. 378, note.

[4] See Preston *v.* The State, 25 Missis. 383.

[5] See Vol. I. § 38.

[6] Gaston, J., in The State *v.* Will, 1 Dev. & Bat. 121, 169.

[7] And see post, § 718.

[8] The State *v.* McCants, 1 Speers, 384; Anonymous, J. Kel. 56; Reg. *v.* Young, 8 Car. & P. 644; Rex *v.* Hayward, 6 Car. & P. 157; Commonwealth *v.* Green, 1 Ashm. 289, 298; McWhirt's Case, 3 Grat. 594; and the other cases cited to this section; 1 Hawk. P. C. Curw. ed. p. 99, § 40.

which, in view of all the circumstances of the case, may be deemed reasonable, the evidence is found of that depraved spirit in which malice resides."[1]

§ 712. **Continued.** — The length of time necessary for cooling has never been made absolute by rule;[2] it must, in the nature of things, depend much on what is special to the particular case. The time in which an ordinary man, under like circumstances, would cool, is generally a reasonable time.[3] "If two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain, this is murder; for there was time to allay the heat, and their after-meeting is of malice."[4] And an hour seems to have been deemed sufficient.[5] Three hours have been.[6] Where a witness testified that the prisoner was "absent no time," though there was a pause in the fight, this was adjudged not sufficient.[7] Hawkins states the doctrine thus: "If two persons quarrel over night, and appoint to fight the next day, or quarrel in the morning and agree to fight in the afternoon, or such a considerable time after by which, in common intendment, it must be presumed that the blood was cooled, and then they meet and fight, and one kill the other, he is guilty of murder."[8]

§ 713. **Continued — Provocation — (Questions of Law).** — The sufficiency of the cooling time, and the sufficiency of the provocation, are respectively questions of law, not of fact.[9]

§ 714. 2. *Killing of Malice independent of the Passions:* — **Is Murder.** — Whatever may be the provocation in a particular case, if, in fact, the person inflicting the homicide was impelled, not by the passion it excited, but by prior malice, his offence is murder.[10] Thus, —

§ 715. **Seeking Quarrel.** — If a man determines to kill another

[1] Wardlaw, J., in The State *v.* McCants, supra, p. 390.

[2] Maher *v.* People, 10 Mich. 212, 223.

[3] Kilpatrick *v.* Commonwealth, 7 Casey, 198.

[4] Rex *v.* Legg, J. Kel. 27.

[5] Rex *v.* Oneby, 2 Stra. 766, 2 Ld. Raym. 1485.

[6] Johnson *v.* The State, 30 Texas, 748.

[7] The State *v.* Moore, 69 N. C. 267. And see Hurd *v.* People, 25 Mich. 405.

[8] 1 Hawk. P. C. Curw. ed. p. 96, § 22. But see Maher *v.* People, 10 Mich. 212.

[9] The State *v.* McCants, 1 Speers, 384; The State *v.* Craton, 6 Ire. 164; The State *v.* Dunn, 18 Misso. 419; Reg. *v.* Fisher, 8 Car. & P. 182; Beauchamp *v.* The State, 6 Blackf. 299; Felix *v.* The State, 18 Ala. 720; Rex *v.* Beeson, 7 Car. & P. 142; The State *v.* Jones, 20 Misso. 58; The State *v.* Sizemore, 7 Jones, N. C. 206.

[10] The State *v.* Green, 37 Misso 466; Riggs *v.* The State, 30 Missis. 635. See People *v.* Lewis, 3 Abb. Ap. Dec. 535; Commonwealth *v.* Drum, 8 Smith, Pa 9

or to do him great bodily harm, and seeks a quarrel, he cannot avail himself of the passion it excites; because he acts from an impulse which his mind received in its cool moments.[1]

§ 716. **Predetermination and Sudden Quarrel.** — And where the quarrel is not sought, if two persons, one of whom intends to kill the other, meet and come to blows; and the former inflicts an injury from which death follows; he is guilty of murder or manslaughter, according as the killing was in consequence of the prior malice or of the sudden provocation.[2] And if a man unprovoked resolves to use a deadly weapon against any one who may assail him, a fatal blow on being assailed is deemed rather to spring from the malice than the passion. "None but a bad man, of a wicked and evil disposition, would really determine beforehand to resent a blow with such an instrument."[3] Still it was once said by a learned judge, that, "whenever the circumstances of the killing would not amount to murder, the proof even of express malice will not make it so." Therefore it was held, that, where a killing is really necessary in self-defence, it will not be murder, though the slayer had express malice. He may rely on the fact that he did only what he had the right to do.[4] Such a killing, the reader perceives, would not be even manslaughter.

§ 717. **Unfair Fighting.** — So when a man enters a contest dangerously armed, and fights at unfair advantage, his offence, if death follows, is murder.[5] Here malice appears from what he did before his passion was heated.

[1] Stewart *v.* The State, 1 Ohio State, 66; People *v.* McLeod, 1 Hill, N. Y. 377; Slaughter *v.* Commonwealth, 11 Leigh, 681; The State *v.* Martin, 2 Ire. 101; The State *v.* Hildreth, 9 Ire. 429; The State *v.* Lane, 4 Ire. 113; Reg. *v.* Smith, 8 Car. & P. 160; Rex *v.* Thomas, 7 Car. & P. 817; The State *v.* Johnson, 1 Ire. 354; The State *v.* Tilly, 3 Ire. 424; Rex *v.* Mason, 1 East P. C. 239; Felix *v.* The State, 18 Ala. 720; Rex *v.* Wormall, 2 Rol. 120; Murphy *v.* The State, 37 Ala. 142.

[2] Reg. *v.* Kirkham, 8 Car. & P. 115. See Rex *v.* Mason, 1 East P. C. 239; Reg. *v.* Smith, 8 Car. & P. 160; The State *v.* Johnson, 1 Ire. 354; The State *v.* Tilly, 3 Ire. 424; Copeland *v.* The State, 7 Humph. 479.

[3] Rex *v.* Thomas, 7 Car. & P. 817. See Selfridge's Case, Whart. Hom. 417; Reg. *v.* Smith, 8 Car. & P. 160; Slaughter *v.* Commonwealth, 11 Leigh, 681; The State *v.* Ferguson, 2 Hill, S. C. 619; The State *v.* Hogue, 6 Jones, N. C. 381; Atkins *v.* The State, 16 Ark. 568.

[4] Golden *v.* The State, 25 Ga. 527, opinion by Lumpkin, J. He even added: "One may harbor the most intense hatred toward another; he may court an opportunity to take his life; he may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account." p. 532.

[5] The State *v.* Hildreth, 9 Ire. 429; Rex *v.* Whiteley, 1 Lewin, 173; People *v.* Sanchez, 24 Cal. 17. And see Ex parte

§ 718. **Blood actually cool.** — Says Hawkins: "Whenever it appears from the whole circumstances of the case, that he who kills another on a sudden quarrel was master of his temper at the time, he is guilty of murder: as, if, after the quarrel, he fall into other discourse, and talk calmly thereon; or perhaps if he have so much consideration as to say, that the place wherein the quarrel happens is not convenient for fighting, or that if he should fight at present he should have the disadvantage by reason of his shoes, &c."[1] In other words, if the actual furor of mind does not exist, or does not impel the arm which inflicts the fatal blow, there is no excuse from passion to reduce the offence to manslaughter.[2]

§ 719. Fifthly. *The Act which distinguishes Murder from Manslaughter, as connected with the Conduct of Third Persons:* —

In first Volume. — The right to interfere in quarrels in behalf of others,[3] and whether one may take the life of an innocent person to save his own,[4] were considered in the first volume.

Conduct of one, not justify killing another. — From those discussions help may possibly be derived in deciding the question, whether the conduct of one person may justify the killing of another. We appear to have no direct decisions to guide us; but there is the strong dictate of reason and justice, that resentment for an injury which one person has inflicted, if wreaked on another who is innocent, could receive no palliation on the ground of any sudden excitement. It is held that —

Blow killing wrong Person. — If, on a sudden quarrel between two persons, a blow intended for one of them accidentally falls on a third, whom it kills, the homicide will be only manslaughter, the same as if the blow had taken the life of the person for whom it was meant.[5]

Wray, 30 Missis. 673; Pierson *v.* The State, 12 Ala. 149; Floyd *v.* The State, 3 Heisk. 342.

[1] 1 Hawk. P. C. Curw. ed. p. 96, § 23. Said an American judge: "There can be no such thing in law as a killing with malice, and also upon the *furor brevis* of passion; and provocation furnishes no extenuation, unless it produces passion. Malice excludes passion. Passion presupposes the absence of malice. In law they cannot co-exist." Gaston, J., in The State *v.* Johnson, 1 Ire. 354. And see Commonwealth *v.* Green, 1 Ashm. 289, 298.

[2] See The State *v.* McCants, 1 Speers, 384; Rex *v.* Hayward, 6 Car. & P. 157; Monroe *v.* The State, 5 Ga. 85.

[3] Vol. I. § 877.

[4] Vol. I. § 348 and note, 845.

[5] Rex *v.* Brown, 1 Leach, 4th ed. 148, 1 East P. C. 231, 245, 274.

§ 720. Sixthly. *The Distinction between Murder and Manslaughter under the Statutes of some of the States:* —

In general. — The line which separates murder from manslaughter, as it comes to us from England, and is drawn in the foregoing sections of this sub-title, remains unaltered in most of our States.[1] But there are States, notably New York, in which legislation has interfered, and, in particulars not very important, drawn it somewhat differently.[2] As every reader will have before him the statutes of his own State, there is no need for these pages to be encumbered with their provisions.

§ 721. **New York.** — New York being a large and in some respects a pattern State, the reader may like to see something of the effect of its statutes on this subject. If one, while committing a misdemeanor,[3] unintentionally kills another, the homicide is, under the statute, manslaughter of the first degree.[4] Another provision makes the killing murder, when, not being manslaughter, it is "perpetrated by any act imminently dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual;" and such an act is in many cases a misdemeanor. Still, the majority of the court has held, that a death unintentionally caused by cruelly beating a person is not murder within this clause; and the opinion is expressed, that, in the language of Selden, J., "this subdivision was designed to provide for that class of cases, and no others, where the acts resulting in death are calculated to put the lives of *many persons* in jeopardy, without being aimed at any one in particular, and are perpetrated with a full consciousness of the probable consequence."[5] The killing of a human being by a person engaged in the commission

[1] See Bivens *v.* The State, 6 Eng. 455.

[2] As to Mississippi, Boles *v.* The State, 9 Sm. & M. 284.

[3] Ante, § 691–694.

[4] People *v.* Rector, 19 Wend. 569; People *v.* Johnson, 1 Parker C. C. 291; People *v.* Enoch, 13 Wend. 159, 174; People *v.* Austin, 1 Parker C. C. 154.

[5] Darry *v.* People, 2 Parker C. C. 606, 648, 6 Seld. 120. Parker, J., said, in accordance with this view, that he deemed the subdivision designed to cover such cases, "as where death is caused by firing a loaded gun into a crowd; by poisoning a well from which people are accustomed to draw water; or by opening the draw of a bridge just as a train of cars is about to pass over it. In such and like cases, the imminently dangerous act, the extreme depravity of mind, and the regardlessness of human life, properly place the crime upon the same level as the taking of life by premeditated design." p. 632 of the report in Parker.

of a felony[1] is murder within the first subdivision, though done without any intent to kill.[2]

§ 722. **Other States.** — There are other States in which the distinction between murder and manslaughter is regulated more or less by statutes.[3]

IV. *What Murders are in the First Degree and what in the Second.*[4]

§ 723. **Historical.** — In 1794, the legislature of Pennsylvania, following the example of the British parliament in dividing felonious homicide into the two degrees since known as murder and manslaughter,[5] separated murder into two degrees; naming the one murder in the first degree, and the other murder in the second degree. More recently the distinction has been adopted in one after another of the other States, till now it prevails quite generally. A few of the illustrative statutes are —

Pennsylvania Statute. — "All murder which shall be perpetrated by means of poison, or lying in wait, or by any other kind of wilful, deliberate, and premeditated killing; or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary; shall be deemed murder in the first degree; and all other kinds of murder shall be deemed murder of the second degree."[6]

Michigan, &c. — In Michigan, the Pennsylvania statute has been enacted in exact words. And, in some other States, forms of expression have been employed so nearly like these as not to require the application of different principles of interpretation.[7] But —

[1] See ante, § 694.

[2] People *v.* Van Steenburgh, 1 Parker C. C. 39. See also, under this statute, Sullivan *v.* People, 1 Parker C. C. 347; People *v.* Clark, 3 Seld. 385; People *v.* Westchester, 1 Parker C. C. 659; Wilson *v.* People, 4 Parker C. C. 619; People *v.* Tannan, 4 Parker C. C. 514; Evans *v.* People, 49 N. Y. 86; ante, § 676.

[3] Hinch *v.* The State, 25 Ga. 699; Hinton *v.* The State, 24 Texas, 454; Jennings *v.* The State, 7 Texas Ap. 350; Shrivers *v.* The State, 7 Texas Ap. 450; Hill *v.* The State, 5 Texas Ap. 2; The State *v.* Shelledy, 8 Iowa, 477; People *v.* Olmstead, 30 Mich. 431; Rufer *v.* The State, 25 Ohio State, 464.

[4] Consult, in connection with this subtitle, the corresponding one in Crim. Proced. II. § 562 et seq., of the 2d ed., or the chapter of the 3d ed. beginning at § 560.

[5] Ante, § 623–628.

[6] Act of April 22, 1794, § 2.

[7] See Dale *v.* The State, 10 Yerg. 551; Riley *v.* The State, 9 Humph. 646; Bratton *v.* The State, 10 Humph. 103; Whiteford *v.* Commonwealth, 6 Rand, 721; The State *v.* Dunn, 18 Misso. 419; Bivens *v.* The State, 6 Eng. 455; Commonwealth

§ 724. **Indiana.** — The expression is different in Indiana, thus: "If any person of sound memory and discretion shall, purposely, and of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison, or causing the same to be done, kill any reasonable creature in being and under the peace of the State, such person shall be deemed guilty of murder in the first degree." Killing "purposely and maliciously, but without deliberation and premeditation," is murder in the second degree.[1] And —

Ohio. — The statute of Ohio is essentially the same as this Indiana one.[2]

New York. — "The killing of a human being without the authority of law, by poison, shooting, stabbing, or any other means, or in any other manner, is either murder in the first degree, murder in the second degree, manslaughter, or excusable or justifiable homicide, according to the facts and circumstances of each case. Such killing, unless it be manslaughter or excusable or justifiable homicide, . . . shall be murder in the first degree in the following cases: 1. When perpetrated from a deliberate and premeditated design to effect the death of the person killed, or of any human being. 2. When perpetrated by an act immediately dangerous to others, and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual. 3. When perpetrated by a person engaged in the commission of any felony. Such killing, unless it be murder in the first degree, or manslaughter, or excusable or justifiable homicide, . . . shall be murder in the second degree when perpetrated intentionally but without deliberation and premeditation." [3]

v. Jones, 1 Leigh, 598; Wall *v.* The State, 18 Texas, 682; The State *v.* Hoyt, 13 Minn. 132; The State *v.* Lessing, 16 Minn. 75; The State *v.* Stokely, 16 Minn. 282; People *v.* Long, 39 Cal. 694; The State *v.* Pike, 49 N. H. 399; Cotton *v.* The State, 32 Texas, 614, 641; Anderson *v.* The State, 31 Texas, 440; Ake *v.* The State, 30 Texas, 466; Moore *v.* The State, 31 Texas, 572.

[1] Finn *v.* The State, 5 Ind. 400.

[2] Act of March 7, 1835, § 1, 2, 1 Swan. Stats. 269. Slight changes in mere words occur in later revisions of the Indiana Laws. And see Stat. Crimes, § 473. Also, The State *v.* Turner, Wright, 20.

[3] Act of April 12, 1862, 2 Edm. Stats. 677, as amended by Laws of 1873, c. 644, and 1876, c. 333. Shufflin *v.* People, 62 N. Y. 229, 236; Buel *v.* People, 78 N. Y. 492, in which case see a history of the statutes. Other provisions follow regarding murder and manslaughter, among them: "The killing of one human being by the act, procurement, or omission of another, in cases where such killing shall

§ 725. **Massachusetts.** — The Massachusetts statute differs somewhat from the others. It is: "Sect. 1. Murder committed with deliberately premeditated malice aforethought; or in the commission of, or attempt to commit, any crime punishable with death or imprisonment for life;[1] or committed with extreme atrocity or cruelty; is murder in the first degree. Sect. 2. Murder not appearing to be in the first degree is murder in the second degree. Sect. 3. The degree of murder shall be found by the jury. Sect. 4. Whoever is guilty of murder in the first degree shall suffer the punishment of death. Sect. 5. Whoever is guilty of murder in the second degree shall be punished by imprisonment in the State prison for life. Sect. 6. Nothing herein shall be construed to require any modification of the existing forms of indictment."[2]

§ 725 *a*. **What from Diversities of Statutes.** — The statutes are not in their terms so diverse as to render all general consideration of them unprofitable. Nor, on the other hand, are they so absolutely alike as to make the interpretation of one a necessary guide in all particulars to that of the rest. Hence, —

Here. — We shall in this sub-title consider general doctrines, and their applications in some particulars, not all: adding reasonably full citations of the authorities, and leaving the rest to the reader. For no judicious practitioner will omit, on this subject, carefully to consult the statutes and decisions of his own State, in connection with these more general elucidations.

§ 726. *Interpretations of these Statutes:* —

No New Murder — The Old. — These statutes do not change the former bounds of murder; but what, and only what, was murder before is such still.[3] Yet, —

"Divide" — "Degrees." — In language sometimes employed by judges, they "divide" — a word not commonly found in the statutes — the prior offence of murder into "degrees." The use

not be murder according to the provisions of the first title of this chapter, is either justifiable or excusable homicide, or manslaughter." Ib. 679.

[1] This expression is interpreted to include all crimes which may be so punished, though the court has a discretion to impose a lighter sentence. Commonwealth *v.* Pemberton, 118 Mass. 36, 42, 43.

[2] Mass. Gen. Stats. c. 160, § 1-6. And see Commonwealth *v.* Gardner, 11 Gray, 438.

[3] The State *v.* Jones, 1 Houst. Crim. 21; Nye *v.* People, 35 Mich. 16; The State *v.* Hudson, 59 Misso. 135; The State *v.* Curtis, 70 Misso. 594; The State *v.* Raymond, 11 Nev. 98; Baker *v.* People, 40 Mich. 411; The State *v.* Stoeckli, 71 Misso. 559; Gray *v.* The State, 4 Baxter, 331; Petty *v.* The State, 6 Baxter, 610.

of these words, and of the sort of expression embodied in the sixth section of the Massachusetts statute, are among the chief causes of very great mistakes in some of our courts, not all, concerning the form of indictment demanded by the principles of pleading and our constitutional guaranties for murder in the first degree, — a question explained in other connections.[1] The interpretations of the law itself are not particularly objectionable. Now, —

In Principle, — the leading doctrines both of the law and the pleading are plain. Neither the word "divide," were it in the statute, nor "degrees," which is in it, can have any just force to overturn fundamental principles of our jurisprudence. Nor can any legislative permission, however explicit, concerning the form of the indictment, prevail against constitutional guaranties. When the law terms a particular sort of killing murder in the first degree and fixes its punishment, and another sort murder in the second degree and provides a different punishment, the consequence is not different from what it would be if the one were called life-taking and the other extinguishment of the vital flame. Prior to the statute, every killing of "malice prepensed" was murder. Since the statute, when to this another degree of malice is added, the particular killing becomes murder in the first degree; but, when there is no such addition made, it is murder in the second degree.[2] And no one can be convicted of murder in the first degree unless the fact which in the individual instance makes it such is alleged in the indictment. Moreover, we have, as authority for this, the entire adjudged law on the statute of 23 Hen. 8, c. 1, § 3.[3] While there was no distinction in felonious homicides, and malice was not essential to any, this statute declared such homicides to be murder, excluding the benefit of clergy, whenever committed of "malice prepensed."[4] Thereupon the courts set themselves to interpreting the words "malice prepensed," or "malice aforethought," and out of such interpretations built up the modern law of murder. And they required every indictment for murder to contain these words; in default of which, they would give judgment only for the lower

[1] Crim. Proced. II. § 560–596. See also Stat. Crimes, § 371, 372, 471–475; Bishop First Book, § 401 and note, 455.

[2] Nye *v.* People, 35 Mich. 16.

[3] Ante, § 625–628.

[4] And see Crim. Proced. II. § 497–500.

degree known as manslaughter. If we were not instructed in the adjudged law, we might suppose that "malice *aforethought*" means "*deliberately premeditated* malice;" but in the last subtitle we saw, that the word "aforethought" has received no such interpretation; it does not necessarily require either deliberation or premeditation. Hence, when a killing with "malice aforethought" is murder, and then it is enacted that, for example, murders which are "deliberately premeditated" shall be in the first degree, we know that something of malice must be added to what is required in ordinary murders to make a killing murder in the first degree. Indeed, we shall see that adjudication has reached to this point; but it did so only after travelling through mists.

§ 727. **Two Classes in First Degree.** — The Pennsylvania statute, and those of the other States which are like it, create two classes of murder in the first degree: —

First. **In committing another offence, &c.** — Murder perpetrated by poison, by lying in wait, or by attempting to commit or committing one of the enumerated other offences, is in the first degree. Deliberate premeditation is not essential in this class, nor is the intent to take life; but any killing which is murder at the common law, and of a sort thus mentioned in the statute, will be in the first degree.[1]

[1] Howell *v.* Commonwealth, 26 Grat. 995; Moynihan *v.* The State, 70 Ind. 126; Singleton *v.* The State, 1 Texas Ap. 501; Cox *v.* People, 19 Hun, 430; Buel *v.* People, 78 N. Y. 492; The State *v.* Brown, 7 Oregon, 186; Commonwealth *v.* Pemberton, 118 Mass. 36; Pharr *v.* The State, 7 Texas Ap. 472; Tooney *v.* The State, 5 Texas Ap. 163; Daley's Case, Whart. Hom. 466, 474, charge of King, J.; Commonwealth *v.* Jones, 1 Leigh, 598, 610; People *v.* Sanchez, 24 Cal. 17; People *v.* Vasquez, 49 Cal. 560; People *v.* Long, 39 Cal. 694; Keefe *v.* People, 40 N. Y. 348, 7 Abb. Pr. N. S. 76; The State *v.* Pike, 49 N. H. 399; Riley *v.* The State, 9 Humph. 646; the court, in the last case, observing, "In cases of murder by ordinary means, the circumstances of the transaction must show that it was done wilfully, deliberately, maliciously, and premeditatedly, or it is not murder in the first degree; but, if murder be perpetrated by poison, or lying in wait, it shall be murder in the first degree, . . . if it be proved that the killing was of such a character, that, under ordinary circumstances, it would have been murder at common law, and the fact of lying in wait exist; that fact will make it a case of murder in the first degree under the statute." Green, J. Opinions adverse to the doctrine stated in this quotation have been expressed in Pennsylvania and Connecticut; but the cases are not of a conclusive nature. The State *v.* Dowd, 19 Conn. 388, 391; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227. See further on the question, Souther *v.* Commonwealth, 7 Grat. 673; The State *v.* Hoyt, 13 Minn. 132; Kelly *v.* Commonwealth, 1 Grant, Pa. 484; People *v.* Haun, 44 Cal. 96; Commonwealth *v.* Hanlon, 8 Philad. 401; Commonwealth *v.* Max, 8 Philad. 422; Rowan *v.* The State, 30 Wis. 129; The State *v.* Shock, 68 Misso. 552. This

§ 728. Secondly. "Deliberate and Premeditated." — Much the greater number of the cases which have arisen for adjudication have been upon the clause of the statute making it murder in the first degree, where the malice aforethought was "deliberate and premeditated," or the like. Plainly, in reason, no exact period of time during which there must be deliberation and premeditation could, as matter of law, be laid down. And nothing of this sort has been attempted.[1] Still these statutory words are not without effect: the consequence of which is, that there must be deliberation and premeditation, but they need not be for an appreciable space of time.[2] As already seen, there may be an intent to kill where still the killing will be only manslaughter.[3] So likewise, in a part if not all of the States, there may be a killing with the intent to take life, which will be murder in the second degree only.[4] But except in the classes of cases thus disclosed, wherein the intent comes through a cloud of passion, or otherwise deliberate premeditation is excluded,[5] or where the killing is done through a belief of its necessity in self-defence,[6] or the like, the doctrine to which the courts in most of the States have arrived is, that the intent to take the life is the distinguishing

class of murders appears not to be in the first degree under the Delaware statute, which is in different terms. "Our statute," said Wootten, J., "has divided the crime into two degrees, the first and second, and the killing of a human being unlawfully and with *express* malice is murder of the first degree, and where there is no express malice aforethought, and the fact of killing is done under such circumstances as to make it a case of implied or constructive malice, the crime is murder of the second degree." If the prisoner "did intend to kill" the deceased, "he is guilty of murder of the first degree. But if he did not intend to deprive him of life, and was engaged in any other felonious and unlawful act, such as an attempt to rob him, or the like, he is guilty of murder of the second degree." The State *v.* Boice, 1 Houst. Crim. 355, 358, 360.

[1] The State *v.* Rhodes, 1 Houst. Crim. 476.

[2] Binns *v.* The State, 66 Ind. 428; The State *v.* Curtis, 70 Misso. 594; Milton *v.* The State, 6 Neb. 136, 143; Schlencker *v.* The State, 9 Neb. 300; McQueen *v.* The State, 1 Lea, 285; The State *v.* Hill, 69 Misso. 451; Halbert *v.* The State, 3 Texas Ap. 656; The State *v.* Sharp, 71 Misso. 218; The State *v.* Miller, 67 Misso. 604; Miller *v.* The State, 54 Ala. 155; Quigley *v.* Commonwealth, 3 Norris, Pa. 18; Lanahan *v.* Commonwealth, 3 Norris, Pa. 80; Pistorius *v.* Commonwealth, 3 Norris, Pa. 158; The State *v.* Ah Mook, 12 Nev. 369; The State *v.* Harris, 12 Nev. 414; Palmore *v.* The State, 29 Ark. 248; The State *v.* Garrand, 5 Oregon, 216; The State *v.* Foster, 61 Misso. 549. Compare with ante, § 677. And see the cases cited in a later note to this section.

[3] Ante, § 676.

[4] The State *v.* Wieners, 66 Misso. 13; The State *v.* Hudson, 59 Misso. 135; The State *v.* Cooper, 71 Misso. 436; The State *v.* Williams, 69 Misso. 110.

[5] Green *v.* Commonwealth, 2 Norris, Pa. 75.

[6] Pistorius *v.* Commonwealth, 3 Norris, Pa. 158.

feature of murder in the first degree under the clause now in contemplation; so that, where it exists, the murder is in this degree, and in the second where it does not exist.[1] Nor, as just said, need the purpose to extinguish life have been in the mind an appreciable space of time before its execution for the murder to be of the first degree; the rule even, in a considerable part of the States, being apparently the same as at the common law.[2] Still, —

[1] The State *v.* Wieners, 66 Misso. 13; The State *v.* Jones, 64 Misso. 391; Duebbe *v.* The State, 1 Texas Ap. 159; The State *v.* Kilgore, 70 Misso. 546; Swan *v.* The State, 4 Humph. 136; Dains *v.* The State, 2 Humph. 439; Clark *v.* The State, 8 Humph. 671; Commonwealth *v.* Murray, 2 Ashm. 41; Commonwealth *v.* Williams, 2 Ashm. 69; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227; Dale *v.* The State, 10 Yerg. 551; Pirtle *v.* The State, 9 Humph. 663; Whiteford *v.* Commonwealth, 6 Rand. 721; Bivens *v.* The State, 6 Eng. 455; Mitchell *v.* The State, 5 Yerg. 340, 8 Yerg. 514; Hill *v.* Commonwealth, 2 Grat. 594; Hagan *v.* The State, 10 Ohio State, 459; Loeffner *v.* The State, 10 Ohio State, 598; The State *v.* Phillips, 24 Misso. 475; The State *v.* Shoultz, 25 Misso. 128; Warren *v.* Commonwealth, 1 Wright, Pa. 45; Kelly *v.* Commonwealth, 1 Grant, Pa. 484; People *v.* Doyell, 48 Cal. 85; People *v.* Long, 39 Cal. 694; Jones *v.* Commonwealth, 25 Smith, Pa. 403; The State *v.* Hammond, 35 Wis. 315; Shelton *v.* The State, 34 Texas, 662; The State *v.* Starr, 38 Misso. 270. See The State *v.* Nueslein, 25 Misso. 111; Respublica *v.* Bob, 4 Dall. 145; Bennett *v.* Commonwealth, 8 Leigh, 745; The State *v.* Smith, 32 Maine, 369; The State *v.* Hicks, 27 Misso. 588; The State *v.* Johnson, 8 Iowa, 525; People *v.* Foren, 25 Cal. 361; Kilpatrick *v.* Commonwealth, 7 Casey, Pa. 198; Robbins *v.* The State, 8 Ohio State, 131; Fouts *v.* The State, 8 Ohio State, 98; Beaudien *v.* The State, 8 Ohio State, 634. In a Pennsylvania case, Lowrie, C. J., observed: "Our statute adopts the common-law definition of murder, and then distinguishes it of two degrees; defining the first degree *specially* by certain enumerated cases, and *generally* by the words 'another kind of wilful, deliberate, and premeditated killing.' . . . Our reported jurisprudence is very uniform in holding, that the true criterion of the first degree is the intent to take life. . . . An intent distinctly formed, even 'for a moment' before it is carried into act, is enough." Keenan *v.* Commonwealth, 8 Wright, Pa. 55, 56, 57.

[2] Ante, § 677, 695; Shoemaker *v.* The State, 12 Ohio, 43; Jordan *v.* The State, 10 Texas, 479; Anthony *v.* The State, Meigs, 265; Swan *v.* The State, 4 Humph. 136; The State *v.* Dunn, 18 Misso. 419; The State *v.* Jennings, 18 Misso. 435; People *v.* Clark, 3 Seld. 385; Donnelly *v.* The State, 2 Dutcher, 463, 601; Atkinson *v.* The State, 20 Texas, 522; People *v.* Bealoba, 17 Cal. 389; Lewis *v.* The State, 3 Head, 127; Kilpatrick *v.* Commonwealth, 7 Casey, Pa. 198; People *v.* Long, 39 Cal. 694; Keenan *v.* Commonwealth, 8 Wright, Pa. 55; Lewis *v.* The State, 3 Head, 127; People *v.* Cotta, 49 Cal. 166; Hogan *v.* The State, 36 Wis. 226; Ake *v.* The State, 31 Texas, 416; Ake *v.* The State, 30 Texas, 466; Herrin *v.* The State, 33 Texas, 638; Johnson *v.* The State, 30 Texas, 748; The State *v.* Millain, 3 Nev. 409; The State *v.* Hoyt, 13 Minn. 132; The State *v.* Holme, 54 Misso. 153. Contra, Bivens *v.* The State, 6 Eng. 455. As to the Indiana statute, see Finn *v.* The State, 5 Ind. 400. And the Indiana court seems perhaps to require something more of deliberation than do some others, to constitute murder of the first degree. Said Elliott, J., "The *principle* involved, by which murder in the first degree is distinguished from murder in the second degree, is this, — in the former, premeditated malice requires that there should be time and opportunity for deliberate thought; and that, after the mind

Differences. — There are, relating to this question, differences in the terms of the statutes and the interpretations put upon them by the courts, in the several States, into which it will not be profitable here to enter. And the caution is repeated, that the practitioner should consider carefully the exact words of his own statutes, and the adjudications upon them of the courts of his own State. Even —

Express Statutory Terms — (Alabama). — There are States in which the express terms of the statute exclude the interpretation above given. For example, in Alabama, "Every homicide perpetrated by any act greatly dangerous to the lives of others, and evidencing a depraved mind regardless of human life, although without any preconceived purpose to deprive any particular person of life, is murder in the first degree," — words which render the intent to take life a non-essential in this higher degree of murder.[1] So that, if, for illustration, one wrongfully places upon a railroad track an obstruction by which a train of cars is thrown off and a person is killed, his offence of murder is in the first degree.[2]

conceives the thought of taking the life, the conception is meditated upon, and a deliberate determination formed to do the act: that being done, then, no difference how soon afterward the fatal resolve is carried into execution, it is murder in the first degree." Fahnestock *v.* The State, 23 Ind. 231, 263. And perhaps the Missouri tribunal may be classed with the Indiana; as see the Missouri cases before cited to this section. And see The State *v.* Mahly, 68 Misso. 315; The State *v.* Gassert, 65 Misso. 352. In the Pennsylvania case of Keenan *v.* Commonwealth, supra, Lowrie, C. J., said: "The deliberation and premeditation required by the statutes are, not upon the *intent*, but upon the *killing*. It is deliberation and premeditation enough *to form* the intent to kill, and not *upon* the intent after it has been formed." p. 56. Again: "Keeping this common understanding of the definition in mind, we shall also get clear of the influence of the cases in other States, where the terms 'deliberate' and 'premeditated' are applied to the malice or intent, and not to the act, and thus seem to require a purpose brooded over, formed, and matured before the occasion at which it is carried into act." p. 57. Of the like sort is the Kansas doctrine. Craft *v.* The State, 3 Kan. 450.

[1] Washington *v.* The State, 60 Ala. 10.

[2] Presley *v.* The State, 59 Ala. 98. Compare with The State *v.* Brown, 1 Houst. Crim. 539. And see the Alabama cases of Miller *v.* The State, 54 Ala. 155, and Fields *v.* The State, 52 Ala. 348. **Other States.** — As to Delaware, see ante, § 727, note; The State *v.* Jones, 1 Houst. Crim. 21; The State *v.* Buchanan, 1 Houst. Crim. 79; The State *v.* Bowen, 1 Houst. Crim. 91; The State *v.* Hamilton, 1 Houst. Crim. 101; The State *v.* Green, 1 Houst. Crim. 217; The State *v.* Till, 1 Houst. Crim. 233; The State *v.* Draper, 1 Houst. Crim. 291; The State *v.* O'Niel, 1 Houst. Crim. 468; The State *v.* Rhodes, 1 Houst. Crim. 476; The State *v.* Thomas, 1 Houst. Crim. 511, 523. As to Texas, where, as in Delaware, not speaking now of the other clause of the statute (ante, § 727), murder of "express malice" is in the first degree (Tooney *v.* The State, 5 Texas Ap. 163, 188; Primus

Killing One not meant. — In Tennessee, if one meaning to kill a particular person accidentally executes the purpose on another, his offence of murder is held to be only in the second degree;[1] and herein the court expressly overrules some *nisi prius* opinions to the contrary in Pennsylvania.[2]

Resisting Arrest. — One designedly killing another to resist a lawful arrest commits murder in the first degree.[3]

§ 729. **"Extreme Atrocity."** — The murder of a girl eight years old, to conceal a rape perpetrated with severe lacerations, is "committed with extreme atrocity or cruelty" within the Massachusetts statute,[4] therefore is in the first degree.[5] And where a husband killed his wife by repeatedly stamping on and kicking her while prostrate on the floor, whereby was created a prolonged agony terminating in the death alleged, the jury was held to be justified in finding this degree of murder. "Such cruelty," said Colt, J., "must be considered extreme, although it be possible to devise means of producing death which shall manifest a higher degree of criminality. It is enough if the means used were extreme as compared with ordinary means of producing death."[6]

§ 730. **Doctrine of Attempt.** — Connected with a part of the definition of murder in the first degree is an allusion to the law of attempt. As to which the doctrine of attempt, unfolded in our first volume, becomes important. If, there being no intent to

v. The State, 2 Texas Ap. 369, 375). See also Burnham *v.* The State, 43 Texas, 322; Duebbe *v.* The State, 1 Texas Ap. 159; Washington *v.* The State, 1 Texas Ap. 647; Singleton *v.* The State, 1 Texas Ap. 501; Jones *v.* The State, 3 Texas Ap. 150, 155; Taylor *v.* The State, 3 Texas Ap. 387; Halbert *v.* The State, 3 Texas Ap. 656; McCarty *v.* The State, 4 Texas Ap. 461; Richarte *v.* The State, 5 Texas Ap. 359; Summers *v.* The State, 5 Texas Ap. 365; Cox *v.* The State, 5 Texas Ap. 493; Gardenhire *v.* The State, 6 Texas Ap. 147; Evans *v.* The State, 6 Texas Ap. 513; Walker *v.* The State, 6 Texas Ap. 576; Lanham *v.* The State, 7 Texas Ap. 126; Smith *v.* The State, 7 Texas Ap. 414; Shrivers *v.* The State, 7 Texas Ap. 450; Wallace *v.* The State, 7 Texas Ap. 570; Rye *v.* The State, 8 Texas Ap. 163; Guffee *v.* The State, 8 Texas Ap. 187.

[1] Bratton *v.* The State, 10 Humph. 103.

[2] Commonwealth *v.* Dougherty, 7 Smith's Laws, 695, Whart. Hom. 362; Commonwealth *v.* Flavel, Whart. Hom. 363. And see Commonwealth *v.* Green, 1 Ashm. 289; Commonwealth *v.* Keeper of Prison, 2 Ashm. 227; Taylor *v.* The State, 3 Texas Ap. 387; Halbert *v.* The State, 3 Texas Ap. 656; The State *v.* Raymond, 11 Nev. 98; The State *v.* Edwards, 71 Misso. 312; post, § 741.

[3] Tom *v.* The State, 8 Humph. 86; Ruloff *v.* People, 45 N. Y. 213, 11 Abb. Pr. n. s. 245; The State *v.* Green, 66 Misso. 631. See The State *v.* Alford, 80 N. C. 445.

[4] Ante, § 725.

[5] Commonwealth *v.* Desmarteau, 16 Gray, 1. See People *v.* Skeehan, 49 Barb. 217.

[6] Commonwealth *v.* Devlin, 126 Mass. 253, 255.

kill, the charge is, that the killing came through an unsuccessful "attempt" to perpetrate some one of the other crimes enumerated in the statute, it is necessary the prisoner should have intended, in fact, to commit the particular other crime.[1]

V. *Degrees in Manslaughter.*

§ 731. **General View.** — The statutes of some of the States make different degrees of manslaughter. In New York, there are four degrees.[2] In Georgia,[3] Tennessee,[4] and some of the other States, there are two. But we have not sufficient adjudications to render profitable a discussion of this subject.[5]

VI. *The Leading Doctrines of Indictable Homicide epitomized.*

§ 732. *As to Murder:* —

Old Definition. — The definitions of murder commonly found in the books are well represented by Hawkins's, who defines it to be "the wilful killing of any subject whatsoever, through malice forethought."[6] Now, —

[1] Vol. I. § 729, 731, 735; Kelly *v.* Commonwealth, 1 Grant, Pa. 484.

[2] And see, as to New York, Evans *v.* People, 49 N. Y. 86; Mongeon *v.* People, 55 N. Y. 613.

[3] Thomas *v.* The State, 38 Ga. 117.

[4] Nelson *v.* The State, 6 Baxter, 418.

[5] As to Alabama, see Oliver *v.* The State, 17 Ala. 587; Isham *v.* The State, 38 Ala. 213; Cates *v.* The State, 50 Ala. 166. As to Pennsylvania, see Commonwealth *v.* Gable, 7 S. & R. 423; Commonwealth *v.* Flanigan, 8 Philad. 430; Walters *v.* Commonwealth, 8 Wright, Pa. 135. In Wisconsin, to reduce the offence to manslaughter in the fourth degree under R. S. c. 133, § 20, the involuntary killing must be without a cruel or unusual weapon, and without any cruel or unusual means. Keenan *v.* The State, 8 Wis. 132. In Georgia, the expression "attempt to commit a serious personal injury," in the definition of the crime of voluntary manslaughter, in § 7 of div. 4 of the code, means an attempt to commit an injury greater than a provocation by mere words, and less than a felony. Buchanan *v.* The State, 24 Ga. 282. And see further as to Georgia, Stokes *v.* The State, 18 Ga. 17; Welch *v.* The State, 50 Ga. 128. As to Missouri, see The State *v.* Sloan, 47 Misso. 604; The State *v.* Curtis, 70 Misso. 594; The State *v.* Hill, 69 Misso. 451. As to Wisconsin, The State *v.* Dickinson, 41 Wis. 299. As to Indiana, see Bruner *v.* The State, 58 Ind. 159; Reed *v.* The State, 8 Ind. 200.

[6] 1 Hawk. P. C. Curw. ed. p. 92, § 3. Other definitions are, —

Lord Coke. — "Murder is when a man of sound memory and of the age of discretion unlawfully killeth, within any county of the realm, any reasonable creature, *in rerum natura*, under the king's peace, with malice aforethought either expressed by the party or implied by law, so as the party wounded or hurt, &c., die of the wound or hurt, &c., within a year and a day after the same." 3 Inst. 47.

Lord Mansfield. — "Murder is where a man of sound sense unlawfully killeth another of malice aforethought, either express or implied." He adds: "If the malice be express, the facts remain with

Whence this Definition. — This definition is a mere transcript of Stat. 23 Hen. 8, c. 1, § 3, already explained;[1] for, though Hawkins uses the word "forethought" instead of "prepensed," the meaning is the same.

§ 733. **How far accurate.** — This definition lacks the word "felonious," which is a part of the law's designation of every felony.[2] If added, it would be exact. But —

Means Nothing. — Though, thus amended, it is correct, it is practically without meaning; because, where the question is whether a particular killing is murder or manslaughter, it is only repeating the statutory words to say that it is murder if of "malice aforethought."

How it should be. — What a definition should do is to define "malice aforethought." It is a truism, not a definition, to say, that when a felonious killing is of malice aforethought it is murder, and when not it is manslaughter. Therefore —

§ 734. **Proposed Definition.** — Let us see if we cannot discover a definition which, however imperfect, will still furnish some practical help. It must necessarily embody an epitomization[3] of the judicial interpretations which have been given to the words "malice aforethought." Murder, then, is that species of felonious killing, technically known by the phrase "wilful and of malice aforethought," which proceeds from an intent to take life without excuse, or the intended commission of some other felony, or of some misdemeanor of a sort to endanger life, or the inexcusable use of a dangerous weapon, or some other purpose equal in malignity.[4] Still, —

§ 735. **Complete defining impossible.** — While this definition will in some degree assist the reader, one in all respects neat, com-

the jury. If the malice is to arise from implication, it is a matter of law, the entire consideration of which resides with the court; and, in the present case, the finding that there was no intent to kill does not in any degree vary the question." Rex *v.* Hazel, 1 Leach, 4th ed. 368, 383.

[1] Ante, § 625.

[2] Crim. Proced. I. § 534; II. § 542.

[3] 1 Bishop Mar. & Div. 6th ed. § 4.

[4] **New York Commissioners.** — The New York commissioners propose: "Homicide is murder in the following cases, — 1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being; 2. When perpetrated by any act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual; 3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony." This definition seems to have been drawn in some degree from the Revised Statutes of the State. Draft of a Penal Code, 1864, p. 82.

plete, and exact is, in the nature of the subject, impossible. The idea itself is complex and artificial; and, if it were not so, the language has no words in which it could, in a single sentence, be conveyed. Again, —

Old and Inadequate Phrases. — Some of the phrases, found in our books treating of this subject of murder, are so technical and even meaningless as greatly to embarrass the student. Of this sort are the terms "malice," "depraved heart," "mind fully bent on evil," and other similar ones. They are often employed by judges and text-writers seemingly without its occurring to them that, in truth, they convey no such exact idea as is essential in legal disquisition, and sometimes no idea whatever.[1] Specially unfortunate is the employment, by courts, of language like this in giving directions to juries unread in the law.[2] It mystifies and misleads; yet, practically, if the trial judge addresses them in words plain and comprehensible to their understandings, there is danger that the case may be reversed for error of law; if he mystifies them with what is meaningless yet legally correct, the danger is still greater that the verdict will be irreversibly wrong on the facts.

§ 736. *As to Manslaughter:* —

Old Definitions. — Most of the old definitions of manslaughter have even less of meaning than those of murder. Generally they declare it to be any felonious killing which is not done of "malice aforethought," or "malice prepense."[3] Hawkins expands the idea thus: "Homicide against the life of another, amounting to felony, is either with or without malice. That which is without malice is called manslaughter, or sometimes chance-medley; by which we understand such killing as happens either on a sudden quarrel, or in the commission of an unlawful act, without any deliberate intention of doing any mischief at all."[4] But —

[1] And see Vol. I. § 427 et seq.

[2] Crim. Proced. I. § 980 *a*.

[3] 1 Hale P. C. 449.

[4] 1 Hawk. P. C. Curw. ed. p. 89, § 1.

Other Definitions. — In Rex *v.* Taylor, 2 Lewin, 215, Taunton, J., said: "Manslaughter is homicide, not under the influence of malice, but when the blood is heated by provocation, and before it has time to cool." In South Carolina, on a trial for homicide effected by a deadly weapon, the judge defined manslaughter to be "homicide committed in sudden heat and passion and on sufficient legal provocation;" and again he said, "it is not every killing in passion that the law mitigates down to manslaughter; it must be passion justly excited by legal provocation." The verdict was, guilty of manslaughter, and on appeal it was held that

Unsatisfactory. — This sort of definition is unsatisfactory; both because, as just explained, the words "malice" and "malice aforethought" convey, in themselves, no clear idea of the thing which in law is signified by them, and particularly because it does not adequately draw the line between the indictable and unindictable forms of homicide. Therefore, —

§ 737. **Proposed New Definition.** — Though the subject does not admit of a defining so exact and short as to satisfy equally the demands of the law and of literary taste, the following is proposed: manslaughter is any such unlawful or dangerous act, done contrary to one's duty, as results in the death of a human being within a year and a day from the time of its commission. Now, —

Includes Murder. — This definition includes murder, and properly; because an indictment for manslaughter may be sustained while the proof is of murder.[1]

§ 738. **Further of the Definition.** — This definition is not very enlightening to one who has no previous knowledge of the law. For while it requires, for example, that the unlawful act which produces death shall have been done contrary to the duty of the doer,[2] such duty is matter of legal learning. It cannot be stated in the short terms of a definition. Therefore nothing greatly better in the way of defining is possible. And, proceeding to trace the line between the unindictable and the indictable homicide, we find it long and wavy, the same as between murder and manslaughter.[3] Hence, —

How ascertain the Law. — If we would learn the law of this subject, we must proceed beyond definition to its details. We must look into the cases, see on what principles they severally proceed; and, in their light, determine, step by step, the boundary line between the indictable and the unindictable homicide.

the terms used to characterize it were correct. The State *v.* Smith, 10 Rich. 341. For explanations of the definition in the statutory law of Texas, see Boyett *v.* The State, 2 Texas Ap. 93, 100; Richardson *v.* The State, 9 Texas Ap. 612; Reed *v.* The State, 9 Texas Ap. 317.

[1] Vol. I. § 792. As to manslaughter under the Ohio statute, see Montgomery *v* The State, 11 Ohio, 424.

[2] Reg. *v.* Salmon, 6 Q. B. D. 79, 14 Cox C. C. 494; Davison *v.* People, 90 Ill. 221; Reg. *v.* Towers, 12 Cox C. C. 530; Reg. *v.* Finney, 12 Cox C. C. 625; Reg. *v.* French, 14 Cox C. C. 328; Reg. *v.* Bradshaw, 14 Cox C. C. 83; The State *v.* Hardie, 47 Iowa, 647; United States *v.* Knowles, 4 Saw. 517.

[3] Ante, § 734.

VII. *Attempts to commit Murder and Manslaughter, with Various Forms of Felonious Assault.*

§ 739. **Elsewhere.** — In the first volume, criminal attempts are discussed at large.[1] And in this volume, among assaults, are considered the aggravated forms,[2] including something of what is useful in the present connection. So that —

Here. — We shall have no need to enter into any special developments of principles here; but, for the convenience of practitioners, we shall refer to numerous cases, and in some degree connect them by threads of doctrine.

§ 740. **Statutory Assaults with Intent.** — In affirmance of the common law, and in some degree for increasing its penalties, we have statutes providing special punishments for assaults accompanied with a specific ulterior intent,[3] — being statutory attempts. Thus, —

Assault with Intent to take Life, &c. — There are various forms of statutory assault with intent to take life; as, assaulting one with intent to kill, to commit murder,[4] administering poison[5] with the like intent, attempting to drown with intent to murder,[6] and others of this general sort.[7]

[1] Vol. I. § 723 et seq.

[2] Ante, § 42 et seq.

[3] Ante, § 52.

[4] Vol. I. § 413, note, 730, 736, 750, 751, 756, 758, 768 *a*; Davidson *v.* The State, 9 Humph. 455; Evans *v.* The State, 1 Humph. 394; Humphries *v.* The State, 5 Misso. 203; Wright *v.* The State, 9 Yerg. 342; The State *v.* Fee, 19 Wis. 562; Logan *v.* The State, 2 Lea, 222; Black *v.* The State, 8 Texas Ap. 329; Shinn *v.* The State, 68 Ind. 423; Lancaster *v.* The State, 2 Lea, 575; Hogan *v.* The State, 61 Ga. 43; Meredith *v.* The State, 60 Ala. 441; Pontius *v.* People, 21 Hun, 328; The State *v.* Graham, 51 Iowa, 72; The The State *v.* Painter, 67 Misso. 84; People *v.* Fine, 53 Cal. 263; The State *v.* Trockmorton, 53 Ind. 354; The State *v.* Schele, 52 Iowa, 608; The State *v.* Davis, 14 Nev. 407.

[5] Rex *v.* Harley, 4 Car. & P. 369; Rex *v.* Powles, 4 Car. & P. 571, Reg. *v.* Cluderay, 1 Den. C. C. 514, Temp. & M. 219, 14 Jur. 71, 19 Law J. N. S. M. C. 119; S. C. nom. Reg. *v.* Cluderoy, 2 Car. & K. 907; Rex *v.* Cadman, 1 Moody, 114; Rex *v.* Lewis, 6 Car. & P. 161; Reg. *v.* Michael, 9 Car. & P. 356, 2 Moody, 120; Reg. *v.* Williams, 1 Den. C. C. 39; Lohman *v.* People, 1 Comst. 379; Anthony *v.* The State, 29 Ala. 27; People *v.* Carmichael, 5 Mich. 10; People *v.* Adwards, 5 Mich. 22; Commonwealth *v.* Anthony, 2 Met. Ky. 399; Sumpter *v.* The State, 11 Fla. 247; Reg. *v.* Connell, 6 Cox C. C. 178; Reg. *v.* Dale, 6 Cox C. C. 14; Collins *v.* The State, 3 Heisk. 14.

[6] Sinclair's Case, 2 Lewin, 49.

[7] Tyra *v.* Commonwealth, 2 Met. Ky. 1; Monday *v.* The State, 32 Ga. 672; O'Leary *v.* People, 4 Parker C. C. 187; Weaver *v.* The State, 24 Texas, 387; Reg. *v.* Pearce, 9 Car. & P. 667; Wilson *v.* The State, 25 Texas, 169; Long *v.* The State, 34 Texas, 566; Long *v.* The State, 46 Ind. 582; Reg. *v.* Lallement, 6 Cox C. C. 204; Fulford *v.* The State, 50

§ 741. **Nature of the Act.** — It is general doctrine in the law of attempt, that, to sustain an indictment, the thing done must have some real or apparent adaptability to accomplish the ulterior wrong meant.[1] And this rule applies to these statutes; as, if the allegation is, that the defendant made an assault with intent to murder, it will not be supported where the killing would have been only manslaughter had death taken place.[2] But, as one may commit murder without employing a deadly weapon, it is not necessary that the assault with intent to murder should be with an instrument likely to produce death.[3]

Nature of Intent. — With the act thus described, the necessary intent must blend. The wrong-doer must specifically contemplate taking life; and, though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of attempt to commit murder.[4] Again, —

Intent proved as laid. — The proof must show that the intent was, in fact, the same which is laid in the indictment.[5] If, for example, the allegation is that it was to maim, proof of an intent to frighten will not justify a conviction.[6]

Assault taking effect on one not meant. — If, then, the assault terminates in a battery of a person not meant, is the offence of assault with intent to kill or murder committed?[7] In legal reason, and in the absence of special terms in the statute, it is; because, in such a case, both the statutory act and the statutory

Ga. 591; Slatterly *v.* People, 58 N. Y. 354; People *v.* Keefer, 18 Cal. 636; People *v.* Murat, 45 Cal. 281; The State *v.* Moore, 82 N. C. 659; The State *v.* Hooper, 82 N. C. 663; The State *v.* Benthall, 82 N. C. 664; People *v.* Kerrains, 1 Thomp. & C. 333; The State *v.* Williams, 5 Baxter, 655; People *v.* Aubrey, 53 Cal. 427; Brown *v.* The State, 58 Ga. 212.

[1] Vol. I. § 738.

[2] Vol. I. § 736, note; Elliott *v.* The State, 46 Ga. 159; Read *v.* Commonwealth, 22 Grat. 924; Seborn *v.* The State, 51 Ga. 164; Jackson *v.* The State, 51 Ga. 402; Smith *v.* The State, 52 Ga. 88.

[3] Monday *v.* The State, 32 Ga. 672. And see Williams *v.* The State, 47 Ind. 568; Montalvo *v.* The State, 31 Texas, 63; The State *v.* Nations, 31 Texas, 561; Crane *v.* The State, 41 Texas, 494; McCroskey *v.* The State, 2 Coldw. 178.

[4] Vol. I. § 728–730, 736; The State *v.* Jefferson, 3 Harring. Del. 571; Davidson *v.* The State, 9 Humph. 455; Ogletree *v.* The State, 28 Ala. 693. See Dains *v.* The State, 2 Humph. 439; The State *v.* Clarissa, 11 Ala. 57; Sharp *v.* The State, 19 Ohio, 379; Rex *v.* Coe, 6 Car. & P. 403; Nancy *v.* The State, 6 Ala. 483; People *v.* Shaw, 1 Parker C. C. 327; Maher *v.* People, 10 Mich. 212, 217. But see The State *v.* Bullock, 13 Ala. 413; Moore *v.* The State, 18 Ala. 532; Rex *v.* Howlett, 7 Car. & P. 274; Dave *v.* The State, 22 Ala. 23; The State *v.* Nichols, 8 Conn. 496; People *v.* Vinegar, 2 Parker C. C. 24. Vol I. § 736, note.

[5] Ogletree *v.* The State, 28 Ala. 693.

[6] Reg. *v.* Abraham, 1 Cox C. C. 208. And see Filkins *v.* People, 69 N. Y. 101.

[7] And see ante, § 728, "Killing One not meant." And see Vol. I. § 328, 736.

intent have transpired, — the words of the enactment are covered, and the wrong done is completely within the spirit of its prohibition. The indictment might even charge, that the assault was made on one named, mistaken by the accused for another one named, with intent to take the latter's life; for here the thing done would be *apparently* adapted to accomplish the end meant, which was the death of the latter person, bringing the case within the general rule of the law of attempt. What has been held the reader will see in the note.[1]

Proof of Intent. — Though the law is as above stated, yet, in matter of evidence, the tendency of the thing done may be looked into to determine the intent from which it proceeded.[2] Still this tendency raises merely a presumption of fact, not of law; the jury must, in each case, be satisfied that the specific intent existed as fact in the mind of the prisoner.[3]

§ 742. **Particular Terms of Statute.** — While the reader carries these general doctrines in his mind, he should not fail to note carefully the exact words of the statute on which a question in controversy arises. A suggestive one is the following: —

Degree of Intended Murder. — In Michigan, on an indictment for assault with intent to commit murder, it is immaterial whether

[1] In Mississippi, under a statute which provides a punishment for "every person who shall be convicted of shooting at another with intent to kill," it has been held that the proof must show a special intent to kill the one named in the indictment; an intent to kill any other, or a general malicious intent, not being sufficient. Morgan *v.* The State, 13 Sm. & M. 242. In England, a prisoner was indicted under 7 Will. 4 & 1 Vict. c. 85, § 3 for shooting at and wounding A, with intent to murder him. The proof was that he supposed the person he shot at to be B, whom he intended to murder; and this was held to sustain the indictment. Said Parke, B.: "The prisoner did not intend to kill the particular person, but he meant to murder the man at whom he shot." Reg. *v.* Smith, Dears. 559. The like has been adjudged in California. People *v.* Torres, 38 Cal. 141. Also in Ohio, Callahan *v.* The State, 21 Ohio State, 306. See Hollywood *v.* People, 2 Abb. Ap. Dec. 376. If a person shoots at two, intending to kill one, entirely regardless which, he may, it is held in Massachusetts, be convicted upon an indictment charging assault on the two, with intent to murder both. Commonwealth *v.* McLaughlin, 12 Cush. 615.

[2] Crim. Proced. I. § 1100; Reg. *v.* Jones, 9 Car. & P. 258. See Reg. *v.* Renshaw, 2 Cox C. C. 285, 20 Eng. L. & Eq. 593; Vol. I. § 735.

[3] Morgan *v.* The State, 33 Ala. 413. Here the court held, that the presenting in an angry manner of a pistol loaded and cocked, within carrying distance, with the finger on the trigger, does not raise a legal presumption of intent to murder, where in fact an assault only was committed. Said Stone, J.: The jury "could alone judge of the intent, and the court erred in withdrawing that inquiry from their consideration." p. 415, 416. And see Jeff *v.* The State, 37 Missis. 821; The State *v.* Beaver, 5 Harring. Del. 508; Rumsey *v.* People, 19 N. Y. 41; Vol. I. § 735, 736. But see People *v.* Vinegar, 2 Parker C. C. 24.

the murder would have been, if committed, in the first or second degree.[1] But from the consideration that a specific intent to produce death is required in this aggravated assault,[2] it would follow, that, in States and circumstances wherein the purpose to take life is the distinguishing element of murder in the first degree, and a murder consummated without such purpose is, as of course, in the second degree,[3] this doctrine, thus held doubtless correctly in Michigan, cannot prevail. Accordingly it is laid down in Minnesota, that, to constitute an assault with intent to commit murder, the murder, were the assault effectual, must be in the first degree; because only in the case of a "premeditated design" (the words describing murder in the first degree) to effect death, can there be the intent to take life.[4]

§ 743. **Misdemeanor or Felony.** — All indictable attempts are, at common law, misdemeanor.[5] So, also, are all assaults, however aggravated.[6] Therefore the attempts now in contemplation are misdemeanor; except where the statute makes, as in some instances it does, the particular attempt a felony.[7]

VIII. *Remaining and Connected Questions.*

§ 744. **Felony.** — Murder and manslaughter are both felony at the common law.[8]

Principal in Second Degree — Accessory. — The consequences of this doctrine, as respects principals, and accessories before and after the fact, are such as were explained in the preceding volume.[9]

[1] People *v.* Scott, 6 Mich. 287. And see, as to Indiana, Frolich *v.* The State, 11 Ind. 213. See also Hopkinson *v.* People, 18 Ill. 264; Wilson *v.* People, 24 Mich. 410.

[2] Ante, § 741.

[3] Ante, § 728.

[4] Bonfanti *v.* The State, 2 Minn. 123.

[5] Vol. I § 772.

[6] Ante, § 55.

[7] The State *v.* Boyden, 13 Ire. 505; Commonwealth *v.* Barlow, 4 Mass. 439; The State *v.* Danforth, 3 Conn. 112; Southworth *v.* The State, 5 Conn. 325; Phillips *v.* Kelly, 29 Ala. 628; O'Leary *v.* People, 4 Parker C. C. 187; Commonwealth *v.* Yancy, 2 Duvall, 375; People *v.* Swenson, 49 Cal. 388; Wilson *v.* People, 24 Mich. 410.

[8] Foster, 302; The State *v.* Ben, 1 Har. & J. 99; The State *v.* Henderson, 2 Dev. & Bat. 543. In Pennsylvania, under Stat. April 22, 1794, § 8, voluntary manslaughter is only misdemeanor.

[9] Vol. I. § 607 et seq. And see, as concerns murder and manslaughter particularly, Vol. I. § 635, 639, 642, 652, 666, 676, 678, 693, 698; The State *v.* McCarn, 11 Humph. 494; Reg. *v.* Good, 1 Car. & K. 185; United States *v.* Ross, 1 Gallis. 624; The State *v.* Simmons, 1 Brev. 6; Reg. *v.* Cuddy, 1 Car. & K. 210; Reg. *v.* Young, 8 Car. & P. 644; Reg. *v.* Whithorne, 3 Car. & P. 394; Rex *v.* Edmeads,

§ 745. **Former Jeopardy — Punishment.** — In that volume, likewise, was considered the question of the effect of a conviction or jeopardy for one instance of offending, on a subsequent indictment for the same or another instance;[1] also, the question of the punishment.[2] Moreover, —

Conviction for Part. — There was a sufficient discussion of the authority to convict for a different offence in degree from the one charged or the one proved.[3]

3 Car. & P. 390; Rex *v.* Hodgson, 1 Leach, 4th ed. 6; Rex *v.* Hubson, 1 East P. C. 258, being s. c.; Rex *v.* Mastin, 6 Car. & P. 396; The State *v.* Hildreth, 9 Ire. 440; Reg. *v.* Howell, 9 Car. & P. 437; Goose's Case, Sir F. Moore, 461; Rex *v.* Murphy, 6 Car. & P. 103; Vaux's Case, 4 Co. 44; Reg. *v.* Alison, 8 Car. & P. 418; Reg. *v.* Tyler, 8 Car. & P. 616; The State *v.* Coleman, 5 Port. 32; Reg. *v.* Williams, 1 Den. C. C. 39; Reg. *v.* Wallis, 1 Salk. 334, 335; Mansell's Case, 2 Dy. 128 *b*, pl. 60; Nuthill *v.* The State, 11 Humph. 247; Mohun's Case, 12 Howell St. Tr. 949, 1022; Cornwallis's Case, 7 Howell St. Tr. 143, 157; The State *v.* Cockman, Winston, II. 95; Goff *v.* Prime, 26 Ind. 196; Harrel *v.* The State, 39 Missis. 702; Mickey *v.* Commonwealth, 9 Bush, 593; United States *v.* Ramsay, Hemp. 481; Commonwealth *v.* Anthony, 2 Met. Ky. 399; Raiford *v.* The State, 59 Ala. 106; The State *v.* Sales, 30 La. An 916; Reg. *v.* Taylor, Law Rep. 2 C. C. 147, 13 Cox C. C. 68; Reg. *v.* Richardson, 2 Q. B. D. 311; Campbell *v.* Commonwealth, 3 Norris, Pa. 187.

[1] Vol. I. § 978 et seq. And see, as to questions of homicide, Vol. I. § 1059; Reg. *v.* Gould, 9 Car. & P. 364; The State *v.* Cooper, 1 Green, N. J. 361; Lohman *v.* People, 1 Comst. 379; Rex *v.* Clark, 1 Brod. & B. 473; The State *v.* Byrd, 31 La. An. 419; The State *v.* Dennison, 31 La. An. 847; The State *v.* Stephens, 13 S. C. 285; Byrd *v.* The State, 1 How. Missis. 163; Fields *v.* The State, 52 Ala. 348; Peri *v.* People, 65 Ill. 17; Lewis *v.* The State, 1 Texas Ap. 323; The State *v.* Elder, 65 Ind. 282; The State *v.* Bell, 81 N. C. 591; Cheek *v.* The State, 4 Texas Ap. 444; The State *v.* Littlefield, 70 Maine, 452; Teat *v.* The State, 53 Missis. 439.

[2] Vol. I. § 927 et seq. And see, as to questions of homicide, Nuthill *v.* The State, 11 Humph. 247; The State *v.* Henderson, 2 Dev. & Bat. 543; White *v.* Commonwealth, 1 S. & R. 139; Cockrum *v.* The State, 24 Texas, 394; The State *v.* Looper, 14 Rich. 92; Opinion of Justices, 11 Cush. 604; Marshall *v.* The State, 33 Texas, 664; Mingia *v.* People, 54 Ill. 274; Thomas *v.* People, 67 N. Y. 218; McGinnis *v.* The State, 31 Ga. 236; The State *v.* Abbott, 8 W. Va. 741; Long *v.* The State, 38 Ga. 491; Green *v.* The State, 55 Missis. 454.

[3] Vol. I. § 791 et seq. And see, as to questions of homicide, Vol. I. § 788, 792, 795, 797, 808, 809, 811; 1 East P. C. 371; The State *v.* Coleman, 5 Port. 32; Kirby *v.* The State, 7 Yerg. 259; Johnson *v.* The State, 17 Ala. 618; McGee *v.* The State, 8 Misso. 495; The State *v.* Arden, 1 Bay, 487; People *v.* Doe, 1 Mich. 451; Reynolds *v.* The State, 1 Kelly, 222; Commonwealth *v.* Gable, 7 S. & R. 423; Green *v.* The State, 8 Texas Ap. 71; Buckner *v.* Commonwealth, 14 Bush, 601; The State *v.* O'Kane, 23 Kan. 244.

For HORSE-RACING, see Stat. Crimes.
HORSE STEALING, see Stat. Crimes; also LARCENY.
HOUSE-BREAKING, see BURGLARY AND OTHER BREAKINGS.
HOUSE, DISORDERLY, see Vol. I. § 1106 et seq.

HOUSE OF ILL-FAME, see Vol. I. § 1083 et seq.
IDLENESS, see Vol. I. § 515, 516.
ILLEGAL MEETING, see UNLAWFUL ASSEMBLY.
ILL-FAME, HOUSE, see Vol. I. § 1083 et seq.
IMPRISONMENT, FALSE, see KIDNAPPING AND FALSE IMPRISONMENT.
INCEST, see Stat. Crimes.
INDECENT EXPOSURE, see Vol. I. § 1125 et seq.
INNKEEPERS, see Vol. I. § 532, 1110, 1118.
INTOXICATING LIQUOR, Selling, &c., see Stat. Crimes.

CHAPTER XXIV.

KIDNAPPING AND FALSE IMPRISONMENT.[1]

§ 746. Introduction.
747–749. False Imprisonment.
750–756. Kidnapping.

§ 746. **Meaning of the Terms — Course of this Chapter.** — Between the terms "Kidnapping" and "False Imprisonment" there is no wide difference in meaning, and sometimes they are employed almost interchangeably. Still, the better use so far distinguishes them that we should do unwisely to regard them as indicating but one offence, to be treated of under a single title. We shall, therefore, in this chapter, consider I. False Imprisonment; II. Kidnapping. In the broadest sense, either term includes various wrongful acts which in the present volumes are discussed under still other titles.[2]

[1] For matter relating to this title, see Vol. I. § 306, 553, 686. Also ante, § 26. For the pleading, practice, and evidence, see Crim. Proced. II. § 365 et seq., 688 et seq. And see Stat. Crimes, § 205, 209, 236, 619.

[2] **Proposed in New York.** — The New York commissioners, under the title Kidnapping, propose the following: "Every person who, without lawful authority, forcibly seizes and confines another, or inveigles or kidnaps another, with intent, either: 1. To cause such other person to be secretly confined or imprisoned in this State against his will; or, 2. To cause such other person to be sent out of this State against his will; or, 3. To cause such person to be sold as a slave, or in any way held to service against his will, — is punishable by imprisonment in a State prison not exceeding ten years." And they observe: "The above section embraces substantially the provisions of 2 Rev. Stat. 664, § 30, and is somewhat broader than the term 'kidnapping,' in the caption of the chapter, would imply. **Meaning of Kidnapping.** — That term is, by earlier writers, used to denote the abduction of children only; and this seems its etymological meaning. See Philip's World of Words; Webst. Dict.; Johns. Dict. Many accurate authorities employ it without respect to the age of the subject; but confine it to an abduction committed with intent to export the person injured out from his own home, State, or country, to another. See Bell's Dict. Law of Scot.; Bouvier's Law Dict.; Jacob's Law Dict. Thus the Revised Statutes of Illinois, Vol. I. p. 336, § 54 & 55, make false imprisonment to consist in a confinement or detention without legal authority, and confine kidnapping to the offence of abducting and sending to another country. The existing provisions of our own Revised Statutes draw no such distinction. . . . Particular offences analogous to kidnapping — for example, abduction of females, and

I. *False Imprisonment.*

§ 747. **Related to Assault — to Battery.** — False imprisonment, employing the term in its better legal meaning, is a species of aggravated[1] assault. Perhaps it does not technically include in every possible case an assault, doubtless it does not always a battery; but generally it includes, at least, an assault.[2]

§ 748. **How defined.** — It is any unlawful restraint of one's liberty, whether in a place used for imprisonment generally, or used only on the particular occasion; or, by words and an array of force, without bolts or bars, in any locality whatever.[3]

Obstruction in one Direction. — In a civil case, the English court held, Lord Denman, C. J., dissenting, that to obstruct a person from going in a particular direction, while he is left free to go in any other, is not a false imprisonment. "In general," said Patteson, J., "if one man compels another to stay in any given place, against his will, he imprisons that other just as much as if he locked him up in a room; and I agree that it is not necessary, in order to constitute an imprisonment, that a man's person should be touched. I agree also, that the compelling a man to go in a given direction against his will may amount to an imprisonment. But I cannot bring my mind to the conclusion, that, if one man merely obstructs the passage of another in a particular direction, whether by threat or personal violence or otherwise, leaving him at liberty to stay where he is or go in any other direction if he pleases, he can be said thereby to imprison him." The ground of Lord Denman's dissent was, that an imprisonment "means any restraint of the person by force."[4]

Manual Touch — Force. — It follows, that, as in arrest there

child-stealing — are the subject of some special provisions in other chapters of this code." Draft of a Penal Code, A. D. 1864, p. 93.

[1] See ante, § 43.

[2] Ante, § 26; Pike *v.* Hanson, 9 N. H. 491; Smith *v.* The State, 7 Humph. 43; Emmett *v.* Lyne, 1 New Rep 255; Click *v.* The State, 3 Texas, 282; 1 Russ. Crimes, 3d Eng. ed. 754; The State *v.* Edge, 1 Strob. 91, as to which see post, § 748, note.

[3] Pike *v.* Hanson, 9. N. H. 491; Smith *v.* The State, 7 Humph. 43; Rex *v.* Webb, 1 W. Bl. 19; Floyd *v.* The State, 7 Eng. 43; Bird *v.* Jones, 7 Q. B. 742; The State *v.* Rollins, 8 N. H. 550; Mitchell *v.* The State, 7 Eng. 50; Oglesby *v.* The State, 39 Texas, 53; Searls *v.* Viets, 2 Thomp. & C. 224; Jones *v.* Commonwealth, 1 Rob. Va. 748; Herring *v.* The State, 3 Texas Ap. 108; Maner *v.* The State, 8 Texas Ap. 361; ante, § 26.

[4] Bird *v.* Jones, 7 Q. B. 742. And see The State *v.* Guest, 6 Ala. 778; Woods *v.* The State, 3 Texas Ap. 204; Harkins *v.* The State, 6 Texas Ap. 452.

need be no manual touch,[1] so none is required in false imprisonment;[2] for, without it, the person may be restrained. "But," said a learned judge, "force of some sort must be used, and it must be a detention against the will, and it is indispensable that these two circumstances should unite."[3]

§ 749. **Misdemeanor, &c.** — False imprisonment is misdemeanor, not felony.[4] The consequences of this doctrine appear in the first volume.[5]

II. *Kidnapping.*

§ 750. **How defined.** — There is some uncertainty as to the exact limits of this offence;[6] but, according to what is believed to be the better view, kidnapping is a false imprisonment, which it always includes, aggravated by the carrying of the person imprisoned to some other place.[7] Possibly a mere intent to carry away, without an actual carrying, may aggravate a false imprisonment to kidnapping.

Whether to another State or Country. — Blackstone and some other English writers define kidnapping to be, "the forcible abduction or stealing away of a man, woman, or child from their own country and sending them into another."[8] But the New Hampshire court, more reasonably, and apparently not in conflict with actual decisions, held that transportation to a foreign country is not a necessary part of this offence.[9]

§ 751. **Consent — Child.** — Of course, the consent of a person of mature years and sane mind, on whom no fraud was practised, would prevent any act from being kidnapping. But it is otherwise of the consent of a young child. At what age the child becomes capable of consenting, or whether the question depends upon age alone, or upon a combination of years and actual capacity shown, we may not find it easy exactly to determine. Chil-

[1] Crim. Proced. I. § 157.

[2] Searls *v.* Viets, 2 Thomp. & C. 224.

[3] Moses *v.* Dubois, Dudley, S. C. 209, 211, opinion by Earle, J. See The State *v.* Edge, 1 Strob. 91, 93. **Illinois.** — As to false imprisonment under the Illinois statute, see Slomer *v.* People, 25 Ill. 70.

[4] 4 Bl. Com. 218; People *v.* Ebner, 23 Cal. 158.

[5] As to Texas, see Redfield *v.* The State, 24 Texas, 133.

[6] See ante, § 746 and note.

[7] Vol. I. § 553; Click *v.* The State, 3 Texas, 282.

[8] 4 Bl. Com. 219. And see 1 Russ. Crimes, 3d Eng. ed. 716; The State *v.* Whaley, 2 Harring. Del. 538; Click *v.* The State, 3 Texas, 282.

[9] The State *v.* Rollins, 8 N. H. 550. And see 1 East P. C. 429.

dren of four,[1] five,[2] six,[3] and nine[4] years respectively have been held to be too young to render their consent available in the defence.[5]

§ 752. **Under Statutes.** — The Illinois statute defines kidnapping to be, as stated by the court, "the forcible abduction or stealing away of a man, woman, or child from his or her country, and sending or taking him or her into another." And it was held, that, to constitute the statutory offence, there need be no application of actual physical force to the person kidnapped; but the exciting of such person's fears, the employment of fraud, and the like, amounting in substance to a coercion of the will, is sufficient. And Walker, J., observed: "While the letter of the statute requires the employment of force to complete the crime, it will undoubtedly be admitted by all that physical force and violence are not necessary to its completion. Such a literal construction would render this statutory provision entirely useless. The crime is more frequently committed by threats and menaces than by the employment of actual physical force and violence."[6] Even, —

Making drunk. — Under the New York statute it is held, that procuring the intoxication of a sailor, as a means of getting him on shipboard without his consent, and then taking him there in this condition, is kidnapping.[7]

§ 753. **Other Statutes.** — We have some other statutes against kidnapping, but a mere reference to adjudications under them will suffice.[8]

[1] The State *v.* Farrar, 41 N. H. 53.

[2] Commonwealth *v.* Robinson, Thacher Crim. Cas. 488.

[3] The State *v.* Rollins, 8 N. H. 550.

[4] Commonwealth *v.* Nickerson, 5 Allen, 518, 527.

[5] And see, as illustrative, Vol. I. § 261; ante, § 36; post, § 1133. The New York commissioners propose to fix the age below which the consent shall not avail the defendant, at twelve years. Draft of a Penal Code, p. 94.

[6] Moody *v.* People, 20 Ill. 315, 318. **Condition of Kidnapped Person, &c.** — It was moreover laid down in this case, that, in determining the guilt or innocence of the accused, the jury should take into consideration the condition of the person kidnapped, her age, education, and state of mind, the object of the defendants in removing her from the State, and all the circumstances surrounding the case as detailed in the evidence. **Threats other than of Force.** — In Massachusetts, an action to recover damages for an abduction and false imprisonment was held not to be maintainable on proof that the defendant, by misrepresentations, threats of a criminal prosecution, and payment of money for expenses, but without either employing or threatening actual force, induced the plaintiff to go to another place, and remain a while in concealment. Payson *v.* Macomber, 3 Allen, 69. And see ante, § 36.

[7] Hadden *v.* People, 25 N. Y. 373.

[8] Commonwealth *v.* Blodgett, 12 Met.

§ 754. **Taking Child from Custody under Divorce.** — Where, on a decree for divorce, the custody of a child is assigned to one of the parents, the other who seizes and carries it off — though actually consenting, if too young to give a legal consent — commits the offence of kidnapping.[1] And the offence is the same in a third person who, by request of the parent not having the custody, seizes and carries away the child, though such child is not in the actual possession of the parent in custody, but is at a school to which the latter has sent it for education.[2]

§ 755. **Misdemeanor.** — Common-law kidnapping is misdemeanor.[3]

§ 756. **Locality.** — In Delaware, an indictment for aiding to kidnap a negro and carry him from the State was held to be properly laid in Kent county; the proof being, that he was seized in Kent, and conveyed through Sussex into Maryland. "This," said the court, "is not like any cases cited, where the offence had its inception in one county and its consummation in another. The consummation . . . was not in Sussex county, but in the State of Maryland. The aiding and assisting, for which the prisoner was indicted, occurred entirely in Kent."[4]

56; People *v.* Merrill, 2 Parker, C. C. 590; Davenport *v.* Commonwealth, 1 Leigh, 588; Thomas *v.* Commonwealth, 2 Leigh, 741; Commonwealth *v.* Nickerson, 5 Allen, 518.

[1] The State *v.* Farrar, 41 N. H. 53.

[2] Commonwealth *v.* Nickerson, 5 Allen, 518.

[3] 1 East P. C. 430; Rex *v.* Baily, Comb. 10.

[4] The State *v.* Whaley, 2 Harring. Del. 538, opinion by Clayton, C. J.

CHAPTER XXV.

LARCENY.[1]

757–760. Introduction.
761–781. The Property at Common Law.
782–787. The Property under Statutes.
788–793. Ownership.
794–798. Asportation.
799–839. Trespass.
840–852. Intent.
853–883. Particular Things and Classes of Persons.
884–891. Remaining and Connected Questions.

§ 757. **The Kinds of Larceny.** — We have seen,[2] that, in England, at the time when we received thence our common law, larceny was divided into —

Grand and Petit. — And we have seen what are the nature and effect of that division. Enough is said of petit larceny in our first volume. Another division of larcenies is into —

Simple and Compound. — A compound larceny is larceny aggravated by some special circumstance. Robbery is a familiar form of compound larceny. Other forms are treated of in our next chapter.[3]

Meaning of "Larceny" — Scope of this Chapter. — The term larceny, in its widest meaning, covers all the foregoing forms; but, when we would be precise, and exclude the compound larcenies, we use the phrase "simple larceny,"[4] which includes both grand and petit; and, descending further toward the minute, we say "grand larceny" or "petit larceny." Petit larcenies, however, having ceased to exist in England and in a large part of our

[1] For matter relating to this title, see Vo.. I. § 137–142, 207, 282, 260–263, 297, 320, 342, 349, 411, 434, 440, 506, 566, 567, 578–583, 585, 654, 676, 679, 680, 743, 757, 767, 792, 794–801, 811, 935, 942, 947, 974, 1061. See this volume, LARCENY, COMPOUND; RECEIVING STOLEN GOODS; ROBBERY. For the pleading, practice, and evidence, see Crim. Proced. II. § 696 et seq. And see, as to both law and procedure, Stat. Crimes, § 127, 140, 211, note, 222, 232–234, 246–248, 325–344, 360, 363, 381, 410–429, 506, 509, 635.

[2] Vol. I. § 679, 680.

[3] And see Vol. I. § 567.

[4] And see Pitcher v. People, 16 Mich. 142.

States, the single word larceny means grand larceny not of the compound sort. But, having no "simple" larcenies, we have no occasion for the correlative "grand;" so we drop it. The present chapter, therefore, treats "simply" of "larceny," — not aggravated to any thing more, or diminished to any thing less.

§ 758. **How defined.** — Larceny is already defined in these pages to be the taking and removing, by trespass, of personal property which the trespasser knows to belong either generally or specially to another, with the intent to deprive such owner of his ownership therein; and, perhaps it should be added, for the sake of some advantage to the trespasser, — a proposition on which the decisions are not harmonious.[1]

[1] 1. Vol. I. § 566. **Other Definitions.** — Some of the definitions of larceny are the following: —

2. **Lord Coke.** — "Larceny, by the common law, is the felonious and fraudulent taking and carrying away, by any man or woman, of the mere personal goods of another." 3 Inst. 107.

3. **Hawkins.** — "A felonious and fraudulent taking and carrying away, by any person, of the mere personal goods of another." 1 Hawk. P. C. Curw. ed. p. 142.

4. **Blackstone.** — "The felonious taking and carrying away of the personal goods of another." 4 Bl. Com. 229.

5. **East.** — "The wrongful or fraudulent taking and carrying away, by any person, of the mere personal goods of another, from any place, with a felonious intent to convert them to his (the taker's) own use, and make them his own property, without the consent of the owner." 2 East P. C. 553.

6. **Grose, J.** — "The felonious taking the property of another without his consent and against his will, with intent to convert it to the use of the taker." Rex *v.* Hammon, 2 Leach, 4th ed. 1083, 1089.

7. **Eyre, B.** — "The wrongful taking of goods, with intent to spoil the owner of them, *causa lucri*." 2 East P. C. 553.

8. **Parke, B.** In substance, — the wrongful or fraudulent taking and carrying away by any person of the mere personal chattels of another, from any place, with the intent without excuse or color of right to deprive the owner, not temporarily, but permanently, of his property, and convert it to the taker's use and make it his, without consent of the owner. Reg. *v.* Holloway, 1 Den. C. C. 370, 2 Car. & K. 942.

9. **Proposed by the English Commissioners, A. D. 1844.** — "A taking and removing of some thing, being the property of some other person and of some value, without such consent as is hereinafter mentioned, with intent to despoil the owner, and fraudulently appropriate the thing taken and removed." Act of Crimes and Punishments, A. D. 1844, p. 168.

10. **Proposed by the English Commissioners, A. D. 1847.** — "Theft is the wrongfully obtaining possession of any movable thing which is the property of some other person and of some value, with the fraudulent intent entirely to deprive him of such thing, and have or deal with it as the property of some person other than the owner." 3d Rep. Eng. Crim. Law Com. of 1845, A. D. 1847, p. 7.

11. **Proposed by the Massachusetts Commissioners, A. D. 1844.** (Majority Report.) — "The fraudulently taking any thing of marketable, salable, assignable, or available value, belonging to or being the property of another, with the intent, on the part of the person so taking the same, fraudulently and without right to appropriate the same to, or dispose of, conceal, or destroy the same for his own use and benefit, or the use and benefit of any other person than the owner of, or

§ 759. **How the Chapter divided.** — Keeping in mind the terms of this definition, and adding something for practical convenience, we have the following heads into which the discussions of

person interested in, the same, or entitled to the possession thereof, and to deprive, defraud, or despoil the owner thereof, or person interested therein, or entitled to possession thereof, of the same, or of the value thereof, or of his property or interest therein, or of the benefit he might derive therefrom, against the will of such owner or person interested, and without, at the time of taking, having an intention then or thereafter *bona fide* to make compensation or indemnity therefor, or a restoration thereof, to such owner thereof, or person interested therein, or entitled to possession thereof." Tit. Larceny, p. 2. (Minority Report.) — "Whoever by a trespass, with an intent to steal, takes and carries away the property of another, of some value, against his will; or his own property, of some value, in either the custody, use, or possession of another, against his will, to make him chargeable for the same or to deprive any person of some interest therein, or claim thereupon; is guilty of larceny." Report of one of the Commissioners, p. 2. And see, for a definition, The State *v.* Gray, 87 Misso. 463.

12. **Proposed by the New York Commissioners.** — "Larceny is the taking of personal property, accompanied by fraud or stealth, and with intent to deprive another thereof." Draft of a Penal Code, A. D. 1864, p. 210.

13. **Definition in the text, considered.** — It is not my purpose to enter into an extended defence of my own definition, which differs from the rest; but a few suggestions will be useful. A definition which requires itself to be defined is but in a slight degree helpful, whether in the law, or in any other science or art. Now, most of the definitions above quoted require to be defined before they can be understood, and this is the fatal objection to this class. Where, in the other class, the objection is attempted to be obviated, there is, it seems to me, either a too cumbersome form of expression, or a want of accuracy. My own definition is too long and wordy to satisfy the critical taste, yet I have not been able both to make it more compact and preserve the needful accuracy and fulness. The definition proposed by the New York commissioners is neat, and it is not in any of the old forms; but it needs defining almost as much as does the thing which itself assumes to define. The reader can test the accuracy of any of these definitions, by comparing them with the adjudged law as he travels through this chapter.

14. **The Several Parts.** — As sustaining the several parts of my own definition, the following cases are referred to: —

15. "*Larceny is the taking and removing by trespass.*" Rex *v.* Raven, J. Kel. 24; Rex *v.* Walsh, 1 Moody, 14; Reg. *v.* Hall, 1 Den. C. C. 381, Temp. & M. 47; Reg. *v.* Hogan, 1 Crawf. & Dix C. C. 366; The State *v.* Hawkins, 8 Port. 461; Reg. *v.* Rosenberg, 1 Car. & K. 233; Reg. *v.* Gruncell, 9 Car. & P. 365; Reg. *v.* Sutton, 8 Car. & P. 291, 2 Moody, 29, 272; Reg. *v.* Thompson, 1 Den. C. C. 549, 1 Eng. L. & Eq. 542; The State *v.* Braden, 2 Tenn. 68; The State *v.* Wisdom, 8 Port. 511; The State *v.* Seagler, 1 Rich. 30; Rex *v.* Abrahat, 2 Leach, 4th ed. 824, 2 East P. C. 569; Reg. *v.* Hall, 2 Car. & K. 947, 1 Den. C. C. 381; Hite *v.* The State, 9 Yerg. 198; Wright *v.* The State, 5 Yerg. 154; Wright *v.* Lindsay, 20 Ala. 428; Rex *v.* Sharpless, 1 Leach, 4th ed. 92, 2 East P. C. 675; Rex *v.* Harvey, 1 Leach, 4th ed. 467, 2 East P. C. 669; Rex *v.* Martin, 1 Leach, 4th ed. 171, 2 East P. C. 618; Rex *v.* Cherry, 1 Leach, 4th ed. 236, note, 2 East P. C. 556; Anonymous, 1 Leach, 4th ed. 321, note; Rex *v.* Peat, 1 Leach, 4th ed. 228, 2 East P. C. 557; Rex *v.* Waite, 1 Leach, 4th ed. 28, 2 East P. C. 570; The State *v.* Whyte, 2 Nott & McC. 174, 177; The State *v.* Wilson, Coxe, 439; The State *v.* Martin, 12 Ire. 157; Pennsylvania *v.* Campbell, Addison, 232; Reg. *v.* White, 20 Eng. L. & Eq. 585; Williams *v.* The State, 34 Texas, 558.

16. "*Of personal property.*" The State

this chapter will be divided: I. The Property of which Larceny at the Common Law may be committed; II. The Property of which Larceny under Statutes may be committed; III. The

v. Moore, 11 Ire. 70; Ward *v.* People, 3 Hill, N. Y. 395, 6 Hill, N. Y. 144; Hoskins *v.* Tarrence, 5 Blackf. 417; Reg. *v.* Gooch, 8 Car. & P. 293; Rex *v.* Walker, 1 Moody, 155; Rex *v.* Westbeer, 2 Stra. 1133, 1 Leach, 4th ed. 12, 2 East P. C. 596; Haynes's Case, 12 Co. 113; People *v.* Wiley, 3 Hill, N. Y. 194, 211; Rex *v.* Williams, 1 Moody, 107; The State *v.* Murphy, 8 Blackf. 498; The State *v.* Burrows, 11 Ire. 477, 483; Commonwealth *v.* Chace, 9 Pick. 15; Wonson *v.* Sayward, 13 Pick. 402; Norton *v.* Ladd, 5 N. H. 203; Warren *v.* The State, 1 Greene, Iowa, 106; Emmerson *v.* Annison, 1 Mod. 89; Reg. *v.* Cheafor, 8 Eng. L. & Eq. 598, 2 Den. C. C. 361; Rex *v.* Rough, 2 East P. C. 607; Hundson's Case, 2 East P. C. 611; Rex *v.* Hedges, 1 Leach, 4th ed. 201, 2 East P. C. 590, note.

17. "*Which the trespasser knows.*" Vol. I. § 303, 311; Merry *v.* Green, 7 M. & W. 623; The State *v.* Homes, 17 Misso. 379. **Lost Goods.** — On this question of knowledge, the distinction between cases in which the finder of lost goods can commit larceny of them and those in which he cannot, in part rests. If, when he takes possession of them, Vol. I. § 207, he knows, or has reasonable cause to believe, that there is an owner to whom he can deliver them; and if, so knowing, he intends to appropriate them to his own use, he is guilty; otherwise not. The following authorities relate to this proposition: The State *v.* Weston, 9 Conn. 527; Reg. *v.* Peters, 1 Car. & K. 245; Reg. *v.* Mole, 1 Car. & K. 417; Reg. *v.* Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Temp. & M. 67; Reg. *v.* Wood, 3 New Sess. Cas. 581, 3 Cox C. C. 453; Reg. *v.* Breen, 3 Crawf. & Dix C. C. 30; The State *v.* Ferguson, 2 McMullan, 502; People *v.* Cogdell, 1 Hill, N. Y. 94; People *v.* Anderson, 14 Johns. 294; Reg. *v.* Preston, 8 Eng. L. & Eq. 589, 2 Den. C. C. 353; Rex *v.* Wynne, 1 Leach, 4th ed. 413, 2 East P. C. 664, 697; Rex *v.* Sears, 1 Leach, 4th ed. 415, note; Murray *v.* The State, 18 Ala. 757; Commonwealth *v.* Hays, 1 Va. Cas. 122; Morehead *v.* The State, 9 Humph. 635; Cash *v.* The State, 10 Humph. 111; Porter *v.* The State, Mart. & Yerg. 226; Lawrence *v.* The State, 1 Humph. 228; Rex *v.* Beard, Jebb, 9; Reg. *v.* York, 12 Jur. 1078; Tyler *v.* People, Breese, 227; Pennsylvania *v.* Becomb, Addison, 386; The State *v.* Williams, 9 Ire. 140; Reg. *v.* Reed, Car. & M. 306; The State *v.* Jenkins, 2 Tyler, 377; Lane *v.* People, 5 Gilman, 305; Ransom *v.* The State, 22 Conn. 153; The State *v.* Conway, 18 Misso. 321; The State *v.* McCann, 19 Misso. 249; Pritchett *v.* The State, 2 Sneed, 285.

18. "*To belong, either generally.*" Reg. *v.* Hayward, 1 Car. & K. 518; Reg. *v.* Smith, 2 Den. C. C. 449, 9 Eng. L. & Eq. 532.

19. "*Or specially.*" Palmer *v.* People, 10 Wend. 165; Rex *v.* Bramley, Russ. & Ry. 478; Commonwealth *v.* Morse, 14 Mass. 217; Jones *v.* The State, 13 Ala. 153; Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14; Reg. *v.* Bird, 9 Car. & P. 44; Rex *v.* Wilkinson, Russ. & Ry. 470; The State *v.* Somerville, 21 Maine, 14; Langford *v.* The State, 8 Texas, 115.

20. "*To another, with the intent of depriving such owner of his ownership therein.*" Reg. *v.* Privett, 1 Den. C. C. 193; Reg. *v.* Holloway, 1 Den. C. C. 370, 2 Car. & K. 942; Rex *v.* Dickinson, Russ. & Ry. 420; Rex *v.* Crump, 1 Car & P. 658; Rex *v.* Philipps, 2 East P. C. 662; Cartwright *v.* Green, 2 Leach, 4th ed. 952, 8 Ves. 405; Merry *v.* Green, 7 M. & W. 623; The State *v.* Self, 1 Bay, 242; Williams *v.* The State, 34 Texas, 558.

21. Thus far, through the definition, the law is clear and uniform. But what shall an author do when he finds differences of judicial opinion on a matter which ought to be covered by the definition? The draftsman of a code puts such a thing in the way he thinks it ought to be; but a text-writer on the law has no such permission. He must state both sides. Therefore I present the two sides in my definition, as follows: —

22. "*And perhaps it should be added,*

Ownership of the Property; IV. The Asportation; V. The Trespass; VI. The Intent; VII. Larcenies of Particular Things and by Particular Classes of Persons; VIII. Remaining and Connected Questions.

§ 760. **The Subject technical.** — We shall find, as we proceed with this subject, our way incumbered by many technical rules; more, indeed, than exist under any other title in the criminal law. The cause of this lies partly in the necessities of the subject itself; and partly in some peculiar notions which prevailed in our mother land, at the time when this branch of our jurisprudence was receiving its early growth. Yet the rules which have been most objected to as unreasonable have stood so long as to be immovable except by legislation; while still a candid consideration of them will leave in our minds the conviction, that, however they may come short of perfect wisdom, they were not adopted without some support from reason.

I. *The Property of which Larceny at the Common Law may be committed.*

§ 761. **Common-law Larcenies — Statutory.** — Under the technical rules of the ancient common law, prevailing still except as expanded by statutes, larceny was restricted, as to the property of which it could be committed, as well as in some other respects, within limits too narrow to meet the requirements of a more refined and commercial age. Consequently statutes, in England and the United States, have greatly enlarged the common-law doctrines. But it is essential, for several purposes, to distinguish

for the sake of some advantage to the trespasser, — a proposition on which the decisions are not harmonious." Reg. *v.* Jones, 1 Den. C. C. 188, 2 Cox C. C. 6; Reg. *v.* Privett, 1 Den. C. C. 193, 2 Car. & K. 114; Rex *v.* Morfit, Russ. & Ry. 307; Reg. *v.* Careswell, 5 Jur. 251; Reg. *v.* Usborne, 5 Jur. 200; Reg. *v.* Cole, 5 Jur. 200, note; Reg. *v.* Richards, 1 Car. & K. 532; Reg. *v.* Handley, Car. & M. 547; Rex *v.* Curling, Russ. & Ry. 123; Smith *v.* Schultz, 1 Scam. 490; Rex *v.* Cabbage, Russ. & Ry 292; Reg. *v.* White, 9 Car. & P. 344; The State *v.* Ware, 10 Ala. 814; Witt *v.* The State, 9 Misso. 671; Reg. *v.* Wynn, 1 Den. C. C. 365, 2 Car. & K. 859, Temp. & M. 32; The State *v.* Hawkins, 8 Port. 461; McDaniel *v.* The State, 8 Sm. & M. 401, 418; Reg. *v.* Godfrey, 8 Car. & P. 563; Alexander *v.* The State, 12 Texas, 540; Jordan *v.* Commonwealth, 25 Grat. 943, 948; post, § 842-846.

23. **Still other Definitions.**—For other definitions, not necessary to be copied here, see Reg. *v.* Holloway, 1 Den. C. C. 370, 375, 2 Car. & K. 942; Witt *v.* The State, 9 Misso. 663; The State *v.* Gray, 37 Misso. 463; Fields *v.* The State, 6 Coldw. 524; 2 Russ. Crimes, 3d Eng. ed. 2.

between what is larceny at the common law and what is such under the statutes. We have seen,[1] that embezzlement is, in most of the statutes relating to it, declared to be larceny, yet by construction the courts have made it a separate offence. But the statutes which simply provide, that the stealing of such and such things, which were not subjects of larceny at the common law, shall be deemed larceny, are not construed, like those, to create an offence distinct from other larcenies.

§ 762. **Real Estate.** — We have seen,[2] that, in consequence of the stable nature of real estate, the common law does not ordinarily hold any injury to it indictable. Therefore the stealing of it is not larceny.[3]

§ 763. **Things adhering to the Soil — (Apples — Trees — Grass — Chattels Real, &c.).** — And this rule extends to every thing adhering to the soil;[4] so that, if, with felonious intent, a man severs and carries away apples from a tree, or the tree itself, or grass or grain standing,[5] or copper or lead or other thing attached to a church or to a private building,[6] or any chattel real,[7] he does not commit this offence.

Gold in Mine. — It is the same of gold-bearing quartz in a mine.[8] Even a nugget of gold, found on a loose pile of rocks, has been held not to be the subject of larceny, if it was separated from the mine, not by man, but by natural causes.[9] But, —

Things not attached — (Window-sashes — Key, &c.). — If there are window-sashes, neither hung nor beaded in the frames, and only fastened by laths nailed across the frames to prevent their shaking out, they are not deemed attached to the soil, and so are the subject of larceny.[10] The same also has been held of a key, although in the lock of a door.[11] And, generally, whatever is not attached is property of which this offence may be committed.[12]

[1] Ante, § 327–329.

[2] Vol. I. § 567.

[3] The State *v.* Burrows, 11 Ire. 477, 483.

[4] Hammond on Larceny, parl. ed. p. 41, pl. 93; 2 East P. C. 588; The State *v.* Hall, 5 Harring. Del. 492; Jackson *v.* The State, 11 Ohio State, 104. But see Ex parte Wilke, 34 Texas, 155; post, § 765, note.

[5] 3 Inst. 109; Pulton de Pace, 127 *b*; Dalton Just. c. 156, § 8; Comfort *v.* Fulton, 39 Barb. 56.

[6] 1 Hawk. P. C. Curw. ed. p. 148, § 34; Dalton Just. c. 156, § 8; 1 Hale P. C. 510. And see Rex *v.* Richards, Russ. & Ry. 28; Reg. *v.* Gooch, 8 Car. & P. 293.

[7] 1 Hale P. C. 510.

[8] People *v.* Williams, 35 Cal. 671.

[9] The State *v.* Burt, 64 N. C. 619.

[10] Rex *v.* Hedges, 1 Leach, 4th ed. 201, 2 East P. C. 590, note.

[11] Hoskins *v.* Tarrence, 5 Blackf. 417.

[12] Reg. *v.* Wortley, 1 Den. C. C. 162; Rex *v.* Nixon, 7 Car. & P. 442; Smith *v.* Commonwealth, 14 Bush, 31.

§ 764. **Fixtures.** — The general rule is, that fixtures — things adhering to the soil — are not the subjects of larceny.[1] There are things of which there may be doubt, whether or not they are to be deemed fixtures within this rule.

Leathern Belt. — In Ohio, it was held to be larceny to steal a leathern belt, connecting certain wheels in a saw-mill.[2]

§ 765. **Severed from Soil.** — When the thing has been severed from the soil, whether by the owner,[3] or by a third person,[4] or even on a previous occasion by the thief himself,[5] it has thus become personal property, the stealing whereof is larceny.[6]

Turpentine in Boxes. — The North Carolina court held, that turpentine, which has flowed down the trees into boxes[7] made in them by the owners to catch it, in a state to be dipped out, is within this rule; though, in the particular case, the indictment being for stealing two barrels of turpentine, and the proof being that it had been dipped from the boxes at different times until nearly two barrels in all were taken, there was held to be a fatal variation of form between the allegation and proof. "A barrel of turpentine or flour is one thing, constituted by both the cask and its contents; and it is known so to be by that description."[8]

[1] Jackson *v.* The State, 11 Ohio State, 104; The State *v.* Davis, 22 La. An. 77.

[2] Jackson *v.* The State, supra.

[3] The State *v.* Moore, 11 Ire. 70.

[4] Dalton Just. c. 156, § 8.

[5] Emmerson *v.* Annison, 1 Mod. 89.

[6] 1 Hawk. P. C. Curw. ed. p. 148, § 34. In Jackson *v.* The State, 11 Ohio State, 104, cited to the last section, Peck, J., observed of this rule: "The rule that things savoring of the realty cannot be the subject of larceny, where the severance and asportation are continuous acts, is, to say the least of it, very subtle and unsatisfactory. The wrongful severance does not destroy the title nor the constructive possession of the owner; it is still his property *in its altered condition:* and its felonious asportation, though immediate, would seem to be as much a felonious taking of the personal property of another from his possession and without his consent as if the wrong-doer had severed it one day and removed it the next. In every case there is necessarily a point of time between its severance and its asportation; and, upon principle, we can see no difference between one instant of time and a period of twenty-four hours; for, in that interval, brief as it may be, the property lodgeth in the right owner as a chattel; and a felonious taking thereof should be larceny." p. 111, 112. The Texas court refused to follow the distinction; and held that, if doors are with felonious intent taken from their hinges and carried away in one transaction, it is larceny. Said Ogden, J.: "It is not the duty or province of the court to invoke a presumption of a refined technicality, in order to save an acknowledged criminal and thief from certain, speedy, and condign punishment." Ex parte Wilke, 34 Texas, 155, 159. And see The State *v.* Berryman, 8 Nev. 262; The State *v.* Parker, 34 Ark. 158.

[7] "An excavation, commonly called a box, is made in the body of the tree near the ground, into which the turpentine runs from the tree above."

[8] The State *v.* Moore, 11 Ire. 70.

Ice. — So ice, put into an ice-house for private use, is a subject of larceny; while, before being gathered, it was not such, because it constituted merely a part of a river or pond.[1]

§ 766. **Severing and Stealing in two Transactions or one.** — When the thief severs, and afterward steals, there seems to have been an opinion, that, for this to constitute two transactions, and therefore a larceny, the time intervening must at least amount to a day, because in law a day is not divisible.[2] The better doctrine, however, is, that no particular space is necessary, only the two acts must be so separated by time as not to constitute one transaction.[3]

Severing and Removing, then Stealing. — An examination of the cases will show, that, where the party has been holden for the larceny of an article originally adhering to the land, by reason of having severed it therefrom on a previous occasion, he left it, when he severed it, on the premises. Now, on principle, suppose he is shown to have carried it off when he severed it; and to have afterward, as a separate transaction, committed a further trespass and carrying away of it, with intent to steal, — is not the latter carrying away a larceny?[4]

[1] Ward *v.* People, 3 Hill, N. Y. 395, 6 Hill, N. Y. 144. And see The State *v.* Pottmeyer, 33 Ind. 402.

[2] Hammond on Larceny, parl. ed. p. 44, pl. 102; Higgins *v.* Andrewes, 2 Rol. 55. As to the doctrine that a day is not divisible, see Stat. Crimes, § 28–31.

[3] Hammond on Larceny, parl. ed. p. 44, pl. 103, citing Udal *v.* Udal, Aleyn, 81–83; Emmerson *v.* Annison, 1 Mod. 89, 2 Keb. 874, 875; Bradcat *v.* Tower, 1 Mod. 89; 1 Hawk. P. C. c 33, § 21; Lee *v.* Risdon, 7 Taunt. 188; The State *v.* Berryman, 8 Nev. 262. In a Delaware case the attorney-general contended, that, if the article has been laid down by the person severing it, though only for a moment, the person may then commit larceny of it, by taking it up immediately. The court, however, declined to yield to this doctrine; but said, "that the question whether this was or was not a larceny, did not depend on the prisoner laying down the pipes and taking them up again, but whether the severing and carrying away was *one continuous transaction*." The State *v.* Hall, 5 Harring. Del. 492. Where three hours had elapsed after the article was severed and laid away on the premises, and then it was carried off in pursuance of one continuous plan and purpose, with no fresh impulse to steal it, this was held to be one transaction, which therefore did not permit the taking to be larceny. Reg. *v.* Townley, Law Rep. 1 C. C. 315, 12 Cox C. C. 59.

[4] See Vol. I. § 137–142. The California court, while adhering to the doctrine of this and the accompanying sections, because so the authorities are, observe: "We confess we do not comprehend the force of these distinctions, nor appreciate the reasoning by which they are supported. We do not perceive why a person who takes apples from a tree with a felonious intent should only be a trespasser, whereas, if he had taken them from the ground after they had fallen, he would have been a thief; nor why the breaking from a ledge of a quantity of rich, gold bearing rock with felonious intent should only be a trespass if the rock be immediately carried off;

§ 767. **Personal Property.** — All larcenies, therefore, at the common law, are of goods and chattels.[1]

Value. — And they must be of some value.[2] Unless they are, they are not property, and no wrong is committed in taking them. But no particular value is required; even, for reasons already seen,[3] the article may be worth less than the smallest coin known to the law.[4]

§ 768. **Paper written on.** — Consequently there may be larceny of a piece of paper, however slight its value, since it has some value. And if the paper is written on, still its value is not utterly destroyed. But, as we shall by and by see,[5] there can be no larceny at the common law of a *chose in action*. The distinction in England therefore is, that, if a *chose in action* is so defective as to be void, or if a promissory note has been paid, an indictment may be maintained for stealing the piece of paper on which it was written.[6] But if the instrument is valid and subsisting, there can be no conviction for stealing it, even though the indictment describes it as a piece of paper; because its character as paper has been absorbed in its higher character as a *chose in action*.[7] There are American cases going to the extent of the English, and perhaps even denying that larceny can be committed of such writings as

but, if left on the ground and taken off by the thief a few hours later, it becomes larceny. The more sensible rule, it appears to us, would have been, that by the act of severance the thief had converted the property into a chattel; and, if he then removed it with a felonious intent, he would be guilty of a larceny, whatever despatch may have been employed in the removal. But we do not feel at liberty to depart from a rule so long and so firmly established by numerous decisions; and we have adverted to the question mainly for the purpose of directing the attention of the legislature to a subject which appears to demand a remedial statute." People *v.* Williams, 35 Cal. 671, 676, 677, opinion by Crockett, J.

[1] 2 East P. C. 587; The State *v.* Burrows, 11 Ire. 477, 483.

[2] Hammond on Larceny, parl. ed. p. 23, pl. 37 et seq.; Rex *v.* Phipoe, 2 Leach, 4th ed. 673, 2 East P. C. 599; People *v.* Wiley, 3 Hill, N. Y. 194; The State *v.* Smart, 4 Rich. 356; The State *v.* Dobson, 3 Harring. Del. 563; Commonwealth *v.* Rand, 7 Met. 475; The State *v.* Allen, R. M. Charl. 518. But see Moore *v.* Commonwealth, 8 Barr, 260; Payne *v.* People, 6 Johns. 103.

[3] Vol. I. § 224.

[4] Reg. *v.* Morris, 9 Car. & P. 349; Rex *v.* Bingley, 5 Car. & P. 602. And see, as illustrating this doctrine, Bishop First Book, § 177–180.

[5] Post, § 769.

[6] Reg. *v.* Perry, 1 Den. C. C. 69, 1 Car. & K. 725; Rex *v.* Clark, Russ. & Ry. 181; s. c. nom. Rex *v.* Clarke, 2 Leach, 4th ed. 1036; Rex *v.* Vyse, 1 Moody, 218. And see People *v.* Wiley, 3 Hill, N. Y. 194.

[7] Reg. *v.* Green, Dears. 323, 6 Cox C. C. 296, 18 Jur. 158, 24 Eng. L. & Eq. 555. And see 1 Hawk. P. C. Curw. ed. p. 148, § 35; 2 East P. C. 597. **Stamp.** — Though a writing is not stamped, still it is a subsisting *chose in action* within the rule stated in the text. Reg. *v.* Watts, Dears. 326, 6 Cox C. C. 304.

come short of being subsisting *choses in action*.[1] But the topic has not been sufficiently discussed in our courts to establish any distinctive doctrine upon it. In principle, if the indictment charges the larceny as of a *chose in action*, or of a thing which appears on the face of the whole allegation to be such and nothing else, there can be no conviction; because the thing thus described is not the subject of larceny. But, in all cases, if the indictment describes it as a piece of paper of a given value, then there may be a conviction for stealing this piece of paper, viewed, not as a *chose in action*, but as mere paper. The reason is, that, as we saw in the preceding volume,[2] defendants are not to elect how they shall be prosecuted, but the power which prosecutes elects; and they cannot, on any principle of reason, set up in defence, that the thing stolen is of *a value above what it is alleged to be, therefore it is of no value*.[3]

§ 769. **Chose in Action.** — But, it is thus seen, for the larceny of a *chose in action* as such, an indictment at the common law cannot be maintained; it being considered a mere evidence of value, or of a right, without intrinsic worth.[4]

Bank-note. — And this principle goes so far as to include even a bank-note, which practically passes current as money.[5]

§ 770. **Muniments of Title — (Deeds — Leases, &c. — Box containing them).** — Writings under which a man holds title to his real

[1] In Payne *v.* People, 6 Johns. 103, the subject of the larceny was described as "a piece of paper on which a certain letter of information was written, of the value of twelve dollars and fifty cents;" and the stealing of it was held not to be criminal. The court said: "A bond, bill, or note was not the subject of larceny at the common law; and they certainly had as much worth in themselves as this letter." So the Pennsylvania court held, that a receipt, obtained in discharge of a debt which was paid with the worthless notes of a broken bank, is not a "valuable thing," within the statute. Moore *v.* Commonwealth, 8 Barr, 260. See also Wilson *v.* The State, 1 Port. 118; and compare it with People *v.* Wiley, 3 Hill, N. Y. 194, 211, and cases cited to the next two sections.

[2] Vol. I. § 791.

[3] **Records.** — Stealing rolls of parchment is a common-law larceny, though they are the records of a court of justice; unless they concern the realty. Rex *v.* Walker, 1 Moody, 155. And, in principle, this seems consistent with what is suggested above; but inconsistent with the idea, that an indictment for larceny cannot be maintained for stealing a *chose in action* described as a piece of paper or parchment.

[4] Vol. I. § 578; Culp *v.* The State, 1 Port. 33; 4 Bl. Com. 234; Reg. *v.* Green Dears. 323, 18 Jur. 128, 24 Eng. L. & Eq 555; People *v.* Cook, 2 Parker C. C. 12.

[5] Rex *v.* Pearson, 1 Moody, 313, 5 Car. & P. 121; Ratcliffe's Case, 2 Lewin, 57; Reg. *v.* Murtagh, 1 Crawf. & Dix C. C. 355; Rex *v.* Johnson, 3 M. & S. 539, 551. See Boyd *v.* Commonwealth, 1 Rob. Va. 691; Pyland *v.* The State, 4 Sneed, 357; Thomasson *v.* The State, 22 Ga. 499.

estate are *choses in action*, therefore not subjects of larceny; but, for this, the English books assign also the further reason, that they savor of the realty.[1] Within this rule is included a commission to settle the boundaries of a manor;[2] likewise a lease for a term of years.[3] And if a box contains writings of this kind, and is sealed up, the books say there can be no larceny of it; because, being sealed, it is of the same nature with its contents;[4] but, if it is unsealed, "it seemeth that the taking of the box feloniously is larceny."[5]

§ 771. **Wild Animals.** — From the doctrine of value, it further results that, at common law, there can be no larceny of animals *feræ naturæ*, or wild animals, unreclaimed. When reclaimed, they become the subjects of this offence; provided they are fit for food, not otherwise.[6]

Honey-bees. — Reclaimed honey-bees are an exception; because, though not fit for food themselves, their honey is.[7]

Hawks. — Likewise tamed hawks have received the distinction of being subjects of larceny, while yet they are not eaten by man; on account "of their noble and generous nature and courage, serving *ob vitæ solatium* of princes and of noble and generous persons, to make them fitter for great employments,"[8] — a reason better appreciated by the ancient gentry of England than by our poultry-raising farmers. Hawkins mentions, as the ground of this exception, the "very high value which was formerly set upon that bird."[9]

§ 772. **Hide of wild Animal.** — When an animal of which there can be no larceny is killed, and labor is expended on it or its hide, the product pretty clearly becomes a subject for this offence, by reason of the labor.[10]

§ 773. **Wild and Reclaimed — Fit for Food or not — (Animals enumerated — Fish).** — Of animals of which, when reclaimed, larceny may be committed, within the foregoing rules, are pigeons

[1] 4 Bl. Com. 234; 2 East P. C. 596; Hammond on Larceny, parl. ed. p. 45, pl. 108; Dalton Just. c. 156, § 8.

[2] Rex *v.* Westbeer, 2 Stra. 1133, 1 Leach, 4th ed. 12, 2 East P. C. 596.

[3] Pulton de Pace, 127 *b*.

[4] Hammond on Larceny, parl. ed. p. 47, pl. 111; 3 Inst. 109; 1 Hale P. C. 510.

[5] Dalton Just. c. 156, § 8.

[6] 4 Bl. Com. 235; The State *v.* House, 65 N. C. 315.

[7] The State *v.* Murphy, 8 Blackf. 498; Harvey *v.* Commonwealth, 23 Grat. 941.

[8] 3 Inst. 109; S. P. 1 Hale P. C. 512.

[9] 1 Hawk. P. C. Curw. ed. p. 149, § 36.

[10] See Reg. *v.* Gallears, 3 New Sess. Cas. 704, 13 Jur. 1010, 1 Den. C. C. 501; Norton *v.* Ladd, 5 N. H. 203.

and doves,[1] hares, conies, deer, swans,[2] wild boars, cranes, pheasants, and partridges;[3] to which may be added fish suitable for food,[4] including undoubtedly oysters.[5] Of those of which there can be no larceny, though reclaimed, are dogs,[6] cats, bears, foxes, apes, monkeys, polecats, ferrets,[7] squirrels, parrots, singing-birds,[8] martins,[9] and coons.[10]

Reclaimed and not fit for Food. — Though animals of the latter class may, when reclaimed, have a recognized value, and the right of property in them be protected in civil jurisprudence,[11] it is otherwise in criminal; on the ground, probably, that anciently they were deemed of no determinate worth, and thus was established a rule which the courts could not afterward change.[12]

§ 774. **Domestic Animals — Fowls — (Enumerated).** — Both the foregoing classes are distinguishable from domestic animals and fowls, such as horses, oxen, sheep, hens, peafowls,[13] turkeys,[14] and the like; which, being tame in their nature, are subjects of larceny on precisely the same grounds as other personal property.[15]

§ 775. **What a Reclaiming.** — Killing a wild animal is reclaiming it, so that, —

[1] Commonwealth *v.* Chace, 9 Pick. 15; Reg. *v.* Cheafor, 2 Den. C. C. 361, 5 Cox C. C. 367, 8 Eng. L. & Eq. 598.

[2] 1 Hawk. P. C. Curw. ed. p. 149, § 41, 42; 4 Bl. Com. 235; 1 Hale P. C. 511, 512.

[3] 3 Inst. 110; Reg. *v.* Shickle, Law Rep. 1 C. C. 158; Reg. *v.* Head, 1 Fost. & F. 350; Reg. *v.* Roe, 11 Cox C. C. 554.

[4] 2 East P. C. 610.

[5] Fleet *v.* Hegeman, 14 Wend. 42. See Reg. *v.* Downing, 11 Cox C. C. 580.

[6] Findlay *v.* Bear, 8 S. & R. 571; Ward *v.* The State, 48 Ala. 161; The State *v.* Holder, 81 N. C. 527; The State *v.* Lymus, 26 Ohio State, 400. **Dogs in New York** — appear to be deemed subjects of larceny, a statute there making them property. People *v.* Maloney, 1 Parker C. C. 593; People *v.* Campbell, 4 Parker C. C. 386. See also, as perhaps to the like effect, The State *v.* McDuffie, 34 N. H. 523. See a subsequent note to this section.

[7] Hammond on Larceny, parl. ed. p. 34, pl. 65; Rex *v.* Searing, Russ. & Ry. 350, as to ferrets; 3 Inst. 109.

[8] Dalton Just. c. 156, § 7.

[9] Norton *v.* Ladd, 5 N. H. 203.

[10] Warren *v.* The State, 1 Greene, Iowa, 106.

[11] Rex *v.* Searing, Russ. & Ry. 350; Norton *v.* Ladd, 5 N. H. 203; Warren *v.* The State, 1 Greene, Iowa, 106; Dalton Just. c. 156, § 7; 1 Hale P. C. 512. That the owner of a dog, for instance, may maintain against a trespasser an action for his value, is well settled. Wheatley *v.* Harris, 4 Sneed, 468; Parker *v.* Mise, 27 Ala. 480. The latter case holds that a dog is a species of property for an injury to which an action may be maintained, and it is not necessary the dog should be shown to be of any pecuniary value, — the court referring to Dodson *v.* Mock, 4 Dev. & B. 146; Perry *v.* Phipps, 10 Ire. 259; The State *v.* Latham, 13 Ire. 33; Wright *v.* Ramscot, 1 Saund. 84; 2 Bl. Com. 393, 394; Lentz *v.* Stroh, 6 S. & R. 34; King *v.* Kline, 6 Barr, 318. See also Vol. I. § 1080.

[12] Hammond on Larceny, parl. ed. p. 35, pl. 66. And see Vol. I. § 275.

[13] Commonwealth *v.* Beaman, 8 Gray, 497, 499.

[14] The State *v.* Turner, 66 N. C. 618.

[15] Dalton Just. c. 156, § 1; 1 Hale P. C. 511.

Carcass. — The carcass, if fit for food, is the subject of larceny.[1]

Oysters in Bed. — The New York court has held, that oysters planted in a bed, clearly marked out in a bay or arm of the sea, are the property of him who plants them, and trespass lies against one interfering with them, though the spot is the common fishery of all the inhabitants of the town.[2] Therefore, under like circumstances, an indictment for larceny could probably be maintained; indeed, the New Jersey tribunal has held that it can be.[3]

Fish in Tank, &c. — Fish confined in a tank or net are sufficiently secured; but how, in a pond, is a question of doubt,[4] which seems to admit of answers differing with the circumstances of cases.

§ 776. **Manual Capture.** — There are two methods of reclaiming a wild animal; the one, by getting a mere physical control of it, as when it is confined in a cage or by a rope; the other, by obtaining what may be called a mental control, which takes place when it is tamed. As to the former method, —

Chasing Fox. — The majority of the New York court held, in a civil cause, that one who hunts a fox acquires in it no property merely by the pursuit; consequently, if another, in sight of the pursuer, kills and takes it, no action will lie. The doctrine was, that he must bring the animal within his control, manifesting an intention to appropriate it to his own use: as, where, after mor-

[1] Dalton Just. c. 156, § 7; 3 Inst. 110; 1 Hale P. C. 511.

[2] Fleet *v.* Hegeman, 14 Wend. 42.

[3] The indictment charged the defendant with stealing eighteen bushels of oysters, of the value of eighteen dollars, of the goods and chattels of, &c. On the trial, the jury were instructed, that, if he feloniously took the same oysters which were planted, if they could be easily distinguished from others in the sound, if they were planted in a place where oysters did not naturally grow, if the place was so marked as to enable persons going into the sound for oysters growing there naturally to distinguish these, and know they were planted and held as private property, and were not natural oysters in a natural bed, they were the subject of larceny. This instruction was held to be correct, and Green, C. J., observed: "Oysters, though usually included in that description of animals [*feræ naturæ*], do not come within the reason or operation of the rule. The owner has the same absolute property in them that he has in inanimate things, or in domestic animals. Like domestic animals, they continue perpetually in his occupation, and will not stray from his house or person. Unlike animals *feræ naturæ*, they do not require to be reclaimed and made tame by art, industry, or education, nor to be confined, in order to be within the immediate power of the owner. . . . Under our laws, there may be property in oysters growing naturally upon the land of another person, and which the owner may have acquired by purchase." The State *v.* Taylor, 3 Dutcher, 117, 119, 120.

[4] 2 East P. C. 610; 3 Inst. 110; Dalton Just. c. 156, § 2; Reg. *v.* Steer, 6 Mod. 183; Hundson's Case, 2 East P. C. 611, 612.

tally wounding it, he continues the chase; or where he encompasses it with nets and toils, or otherwise intercepts it, so as to deprive it of its natural liberty, and render escape impossible. Livingston, J., dissenting, held, that "a person who, with his hounds, starts and hunts a fox on waste and uninhabited ground, and is on the point of seizing his prey, acquires such an interest in the animal as to have a right of action against another, who, in view of the huntsman and his dogs in full pursuit, and with knowledge of the chase, shall kill and carry him away."[1] In another case it was adjudged, that, if, after wounding the animal, and continuing the pursuit until evening, the hunter abandons the ground, though his dogs continue on, he acquires in it no property.[2]

§ 777. **Capturing Bees.** — Marking a tree, which has wild bees in it, is clearly not a reclaiming of them;[3] and the Pennsylvania court held, that even the confining of them in the tree is not enough. They must, at least, be hived and removed before they can be a subject of larceny.[4]

§ 778. **Whale.** — Among whale fishermen, if a whale is killed, anchored, and left with marks of appropriation, it is the property of the captors. And though it should then drag from its first anchorage, and be found by the crew of another vessel, neither by usage nor law is the property of its captors in it divested.[5]

§ 779. **Taming.** — Concerning the other method of reclaiming the animal; if it is made tame, it is sufficiently reclaimed, though under no physical restraint. Thus, —

Pigeons in Dove-cot. — Pigeons kept in an open dove-cot, to which they return every night to roost, are subjects of larceny.[6]

Straying away while Tame. — In civil jurisprudence it has been held, that trover lies for wild geese, which, having been tamed, have strayed away without regaining their natural liberty.[7] On the other hand, the Massachusetts court has denied that larceny

[1] Pierson *v.* Post, 3 Caines, 175.

[2] Buster *v.* Newkirk, 20 Johns. 75. **Right of Hunting.** — In this country, the common-law right to hunt for animals *ferœ naturæ*, in the uncultivated and unenclosed grounds of another, is recognized. McConico *v.* Singleton, 2 Mill, 244; Broughton *v.* Singleton, 2 Nott & McC. 338.

[3] Gillet *v.* Mason, 7 Johns. 16. And see Ferguson *v.* Miller, 1 Cow. 243; Idol *v.* Jones, 2 Dev. 162.

[4] Wallis *v.* Mease, 3 Binn. 546; ante, § 771.

[5] Taber *v.* Jenny, 1 Sprague, 315.

[6] Rex *v.* Brooks, 4 Car. & P. 131; Reg. *v.* Cheafor, 8 Eng. L. & Eq. 598, 2 Den. C. C. 361, 5 Cox C. C. 367, 15 Jur. 1065.

[7] Amory *v.* Flyn, 10 Johns. 102.

can be committed of doves, unless found on the owner's premises.[1] The true view probably is: the defendant must have known that the animal was reclaimed, else he could not have had the intent to steal it;[2] the indictment must set forth that it was reclaimed;[3] or that it was tame;[4] but, further than this, in the language of Mr. Hammond, who seems to have given the subject a pretty careful examination, "in animals *ferœ naturæ* and fit for food, the ownership, when reclaimed, continues notwithstanding any loss of possession; and these, therefore, notwithstanding the loss, are the subjects of larceny."[5]

The Young. — But the taming of wild animals does not extend to their young, which must, it seems, be in what we have termed the physical possession[6] of the owner, or theft cannot be committed of them.[7] Still, —

Pheasants. — Pheasants reared by hens, and never wild,[8] and young pheasants hatched by a hen and under its care, though in a field at a distance from the dwelling-house,[9] are subjects of larceny.

§ 780. **Dead Bodies.** — There can be no property in a person deceased; consequently larceny cannot be committed of his body.[10] But —

Clothes — Shroud. — It can be of the clothes found upon the body,[11] or of the shroud.[12]

§ 781. **Things obtained by wrong.** — If one steals goods from a thief, he commits larceny;[13] and, generally, whatever is produced by wrong is the subject of this offence, the same as are the products of right. Thus, —

Violations of Liquor Laws. — Money received for intoxicating liquor, sold contrary to the inhibitions of a penal statute, may be

[1] Commonwealth *v.* Chace, 9 Pick. 15. And see 1 Hawk. P. C. Curw. ed. p. 149, § 40, 41.

[2] Hammond on Larceny, parl. ed. p. 36, pl. 70; 3 Inst. 110; 1 Hale P. C. 511.

[3] Rex *v.* Rough, 2 East P. C. 607. And see Reg. *v.* Cox, 1 Car. & K. 494.

[4] Reg. *v.* Cheafor, 8 Eng. L. & Eq. 598, 5 Cox C. C. 367, 2 Den. C. C. 361.

[5] Hammond on Larceny, parl. ed. p. 36, pl. 69, referring to 3 Inst. 110; Lamb. 271; Crompt. 33 *b*; Pulton de Pace, 131; Dalton Just. 350; 1 Hale P. C. 511.

[6] Ante, § 776, 777.

[7] 1 Hale P. C. 511.

[8] Reg. *v.* Head, 1 Fost. & F. 350.

[9] Reg. *v.* Cory, 10 Cox C. C. 23; Reg. *v.* Garnham, 8 Cox C. C. 451, 2 Fost. & F. 347.

[10] 2 East P. C. 652; 12 Co. 106, Fraser's note.

[11] Wonson *v.* Sayward, 13 Pick. 402.

[12] Haynes's Case, 12 Co. 113; s. c. nom. Hain's Case, 3 Inst. 110; 1 Hale P. C. 515; 1 Hawk. P. C. Curw. ed. p. 150, § 46.

[13] 1 Hale P. C. 507. **Matter not Mailable.** — Larceny from the post-office may

stolen with the same consequence as any other money.[1] And intoxicating liquor purchased in violation of law, and kept to be sold contrary to the inhibition of a statute, falls within the same doctrine.[2]

Gaming Checks. — In like manner, it has been held that larceny can be committed of "checks kept and used for gambling contrary to a statute."[3]

II. *The Property of which Larceny under Statutes may be committed.*

§ 782. **Extending Common Law.** — The statutes now to be considered are those extending the law of larceny to things which were not the subjects of it before.[4]

§ 783. **In General.** — The general idea, which has found expression in various forms of particular words, has been to make every thing of practical value in the community the subject of this offence, thus doing away with the old and technical distinctions of the common law relating to value. Thus, —

Fixtures — Parts of the Realty — Muniments of Title, &c. — We have statutes against the larceny of fixtures, and of lead and other things which have become incorporated into buildings,[5] and of writings relating to real estate.[6]

§ 784. **Growing Grain, &c.** — By the South Carolina Act of 1826, "If any person shall take from any field, not belonging to such person, any cotton, corn, rice, or other grain fraudulently, with an intent secretly to convert the same to the use of such person taking the same, such person so offending shall be guilty of lar-

be committed of matter not mailable by law. United States *v.* Randall, Deady, 524.

[1] Commonwealth *v.* Rourke, 10 Cush. 397; The State *v.* May, 20 Iowa, 305, 309.

[2] Commonwealth *v.* Coffee, 9 Gray, 139; The State *v.* May, 20 Iowa, 305.

[3] Bales *v.* The State, 3 W. Va. 685. Said Brown, President: "That they could not have been recovered by action, is clear on the general principle that no court would lend its aid to the guilty keeper or owner to recover his illegal articles. And the case of Spalding *v.* Preston, 21 Vt. 9, is directly in point. But still, the question recurs, whether larceny can be committed of such prohibited things. And, to hold that it could not, would be to run the hazard of encouraging larceny by discouraging gaming." p. 687.

[4] Ante, § 761.

[5] Rex *v.* Worrall, 7 Car. & P. 516; Rex *v.* Richards, Russ. & Ry. 28; Reg. *v.* Gooch, 8 Car. & P. 293; Rex *v.* Nixon, 7 Car. & P. 442; The State *v.* Stone, 1 Vroom, 299; Reg. *v.* Jones, Dears. & B 555, 7 Cox C. C. 498.

[6] Rex *v.* John, 7 Car. & P. 324.

ceny." Whereupon the court has held, that corn growing in the field, not previously severed from the soil, is within the act.[1] Likewise are peas within the words "other grain."[2]

§ 785. **Choses in Action, &c. — (Enumerated).** — The most important of these enactments make *choses in action*, records, receipts, and various similar things the subjects of larceny. In other connections are explained the meanings of such words as "*order*,"[3] "*warrant*,"[4] "*request*,"[5] "*promissory note*,"[6] "*bill of exchange*,"[7] "*bank-bill*" or "*bank-note*,"[8] "*undertaking*,"[9] "*receipt*,"[10] "*acquittance*,"[11] "*goods and chattels*,"[12] "*money*,"[13] "*securities and effects*,"[14] "*deeds*."[15] There are also found in these statutes various other words, such as "*personal goods*,"[16] "*personal property*,"[17] "*valuable security*,"[18] "*security for money*,"[19] "*book*

[1] The State *v.* Stephenson, 2 Bailey, 334. There is a preamble which aids this construction; but the court thought the same result would follow without the preamble.

[2] The State *v.* Williams, 2 Strob. 474.

[3] Stat. Crimes, § 325–331, 335; ante, § 560; Rex *v.* Hart, 6 Car. & P. 106.

[4] Stat. Crimes, § 325, 326, 332, 333, 335; ante, § 560; Reg. *v.* Morrison, Bell C. C. 158, 8 Cox C. C. 194.

[5] Stat. Crimes, § 325, 326, 334, 335; ante, § 560.

[6] Stat. Crimes, § 336; ante, § 561; Culp *v.* The State, 1 Port. 33; Rex *v.* Phipoe, 2 Leach, 4th ed. 673, 2 East P. C. 599; Wilson *v.* The State, 1 Port. 118; People *v.* Call, 1 Denio, 120; People *v.* Cook, 2 Parker C. C. 12.

[7] Stat. Crimes, § 338; ante, § 562; Rex *v.* Aickles, 1 Leach, 4th ed. 294, 2 East P. C. 675; Rex *v.* Hart, 6 Car. & P. 106.

[8] Stat. Crimes, § 337; Pomeroy *v.* Commonwealth, 2 Va. Cas. 342; The State *v.* Tillery, 1 Nott & McC. 9; The State *v.* Casados, 1 Nott & McC. 91; Sylvester *v.* Girard, 4 Rawle, 185; Spangler *v.* Commonwealth, 3 Binn. 533; McDonald *v.* The State, 8 Misso. 283; Rex *v.* Mead, 4 Car. & P. 535; Culp *v.* The State, 1 Port. 33; People *v.* Kent, 1 Doug. Mich. 42; The State *v.* Allen, R. M. Charl. 518; Commonwealth *v.* Rand, 7 Met. 475; The State *v.* Dobson, 3 Harring. Del. 563; The State *v.* Smart, 4 Rich. 356; People *v.* Wiley, 3 Hill, N. Y. 194, 211; Rex *v.* Vyse, 1 Moody, 218; Rich *v.* The State, 8 Ohio, 111; Cummings *v.* Commonwealth, 2 Va. Cas. 128; Johnson *v.* People, 4 Denio, 364; Low *v.* People, 2 Parker C. C. 37. And see Starkey *v.* The State, 6 Ohio State 266.

[9] Stat. Crimes, § 339; ante, § 563.

[10] Stat. Crimes, § 341, 342; ante, § 564; People *v.* Loomis, 4 Denio, 380; Reg. *v.* Frampton, 2 Car. & K. 47; Reg. *v.* Rodway, 9 Car. & K. 784; Commonwealth *v.* Williams, 9 Met. 273.

[11] Stat. Crimes, § 343; ante, § 565.

[12] Stat. Crimes, § 344, 345; ante, § 358; Rex *v.* Mead, 4 Car. & P. 535; People *v.* Kent, 1 Doug. Mich. 42; Rex *v.* Vyse, 1 Moody, 218.

[13] Stat. Crimes, § 346; ante, § 357, 482.

[14] Stat. Crimes, § 217, 340; ante, § 359; Rex *v.* Aslett, 1 New Rep. 1, 2 Leach, 4th ed. 958, Russ. & Ry. 67.

[15] Stat. Crimes, § 340, note; ante, § 567.

[16] Stat. Crimes, § 344; United States *v.* Moulton, 5 Mason, 535.

[17] People *v.* Loomis, 4 Denio, 380.

[18] Stat. Crimes, § 217, 340; Reg. *v.* Heath, 2 Moody, 33; Rex *v.* Yates, 1 Moody, 170; Rex *v.* Hart, 6 Car. & P. 106; Rex *v.* Vyse, 1 Moody, 218; Reg. *v.* Smith, Dears. 561; Reg. *v.* Lowrie, Law Rep. 1 C. C. 61, 10 Cox C. C. 388.

[19] Reg. *v.* Williams, 6 Cox C. C. 49.

of accounts,"[1] "*draft*,"[2] "*post-letter*,"[3] and "*record*,"[4] which require no extended explanation here.

"Voucher." — A "voucher," within the New Jersey statute, is any instrument which attests, warrants, maintains, bears witness.[5]

§ 786. **Construction of the Statutes.** — In the construction of these statutes, the rules of common-law larceny are to be applied.[6] Thus, —

How Genuine and of Value. — The *chose in action* must be genuine, and of some value as such, or, at least, must pass for value;[7] yet, under some circumstances, it may be one which the law forbids to be issued; being still binding on the parties, and therefore valuable.[8]

§ 787. **Delivery.** — Where a debtor procured his creditor to sign a receipt for the debt, pretending to be about paying him, and then, without paying, took it away fraudulently, he was held, in New York, not to be guilty of a larceny of the receipt; because it had not become of value by delivery.[9] And a promissory note, which has not passed from the hands of its

[1] Commonwealth *v.* Williams, 9 Met. 273.

[2] Rex *v.* Pooley, Russ. & Ry. 12, 3 B. & P. 311; Reg. *v.* West, Dears. & B. 109.

[3] Reg. *v.* Mence, Car & M. 234, as to the words "shall steal from or out of a post letter, any chattel or money;" Rex *v.* Howatt, 2 East P. C. 604; Reg *v.* Wynn, 1 Den. C. C. 365, Temp. & M 32, 3 New Sess. Cas. 414, 13 Jur. 107; Reg. *v.* Shepherd, Dears. 606.

[4] Wilson *v.* The State, 5 Pike, 513.

[5] The State *v.* Hickman, 3 Halst. 299.

[6] Rex *v.* John, 7 Car. & P. 324; The State *v.* Braden, 2 Tenn. 68; The State *v.* Wisdom, 8 Port. 511; Vaughn *v.* Commonwealth, 10 Grat. 758; People *v.* Call, 1 Denio, 120; Stat. Crimes, § 139–141, 146.

[7] Pomeroy *v.* Commonwealth, 2 Va. Cas. 242; The State *v.* Tillery, 1 Nott & McC 9; The State *v.* Casados, 1 Nott & McC. 91; Rex *v.* Pooley, Russ & Ry. 12, 3 B. & P. 311; McDonald *v.* The State, 8 Misso. 283; Rex *v.* Mead, 4 Car. & P. 535; Culp *v.* The State, 1 Port. 33; Wilson *v.* The State, 1 Port. 118; The State *v.* Allen, R. M. Charl. 518; Commonwealth *v.* Rand, 7 Met. 475; The State *v.* Dobson, 3 Harring. Del. 563; The State *v.* Hand, 3 Harring. Del. 564; The State *v.* Smart, 4 Rich. 356; Johnson *v.* People, 4 Denio, 364; Low *v.* People, 2 Parker C. C. 37.

[8] Ante, § 768; Sylvester *v.* Girard, 4 Rawle, 185; Starkey *v.* The State, 6 Ohio State, 266. See Rex *v.* Yates, 1 Moody, 170; Culp *v.* The State, 1 Port. 33; Rex *v.* Pooley, 3 B. & P. 315, Russ. & Ry. 31; ante, § 538, 539. And see ante, § 781.

[9] People *v.* Loomis, 4 Denio, 380. S. P., perhaps, Reg. *v.* Frampton, 2 Car. & K. 47. Reg. *v.* Rodway, 9 Car. & P. 784, might seem opposed to this doctrine, but for the fact that the indictment was for stealing, not the receipt, but the piece of paper on which it was written. See ante, § 768; Reg. *v.* Smith, 2 Den. C. C. 449, 9 Eng. L. & Eq. 532. And see the observations in Reg. *v.* Frampton, above cited.

maker, is not within statutes against the stealing of promissory notes.[1]

Signature under Duress. — To compel one, by threats and duress, to write and deliver a promissory note is not to steal it.[2]

Redeemed Bank-bills. — But, if bank-bills have been redeemed by the bank, and are in the hands of its agents, it has been held that statutory larceny may be committed of them; for, besides the paper being of value to the bank, "a consideration of more importance is, that, notwithstanding the bills were stolen, yet, on being passed to a *bona fide* holder, the bank would have been bound to him for the payment of them, in the same manner as if they had not been redeemed."[3]

III. *The Ownership of the Property.*

§ 788. **What for "Criminal Procedure."** — The rules to determine in whom the indictment shall lay the ownership of the property stolen are stated in "Criminal Procedure."[4]

Must be Owner. — Yet aside from what is there laid down, things, to be the subjects of larceny, must have an owner in fact;[5] though doubtless he may be unknown to the thief, as he certainly may be to the grand jury who indict him.[6]

§ 789. **Another's.** — According to our definition of larceny, the thing stolen must be "another's."[7] But, —

General or Special Ownership. — The law recognizes in things personal two kinds of ownership, general and special. Therefore an article may be stolen from one who is either the general or special owner of it.[8] For instance, —

[1] Wilson *v.* The State, 1 Port. 118. Yet the maker of a promissory note delivered, is guilty if he steals it from the holder. People *v.* Call, 1 Denio, 120. See, also, People *v.* Mackinley, 9 Cal. 250.

[2] Rex *v.* Phipoe, 2 Leach, 4th ed. 673, 2 East P. C. 599.

[3] Commonwealth *v.* Rand, 7 Met. 475, 476. And see People *v.* Wiley, 3 Hill, N. Y. 194, 211; Rex *v.* Vyse, 1 Moody, 218; Rex *v.* Ransom, Russ. & Ry. 232, 2 Leach, 4th ed. 1090; Reg. *v.* West, Dears. & B. 109.

[4] Crim. Proced. II. § 718–726.

[5] 1 Hale P. C. 512.

[6] 1 Gab. Crim. Law, 602.

[7] Ante, § 758 and note.

[8] Crim. Proced. II. § 720; Ante, § 758, note, par. 19; 1 Hale P. C. 513; 2 East P. C. 652; Langford *v.* The State, 8 Texas, 115; The State *v.* Furlong, 19 Maine, 225; Gatlin *v.* The State, 39 Texas, 130; Moseley *v.* The State, 42 Texas, 78; The State *v.* Mullen, 30 Iowa, 203; Commonwealth *v.* Sullivan, 104 Mass. 552; People *v.* McDonald, 43 N. Y. 61; The State *v.* Stephens, 32 Texas, 155; Turner *v.* The State, 7 Texas Ap. 596; Burt *v.* The State, 7 Texas Ap. 578; The State *v.* Pitts, 12 S. C. 180.

Goods in Hands of Bailee. — Goods in the hands of a bailee may ordinarily be described in the indictment as either the bailee's [1] or bailor's,[2] at the election of him who draws it. And —

Infant's Clothing. — Articles of clothing, worn by an infant, may usually be alleged to belong to the infant [3] or the father,[4] according to such election. So —

Property Stolen. — Goods stolen from a thief may be charged as the goods of either the thief or the true owner.[5]

Illustrative. — Such are illustrations of doctrines which belong as well to the law of "Criminal Procedure" as to the law treated of in these volumes.

§ 790. **Stealing one's own Goods.** — From the foregoing views it follows, that, if goods are in the possession of a special owner, the general owner may commit larceny of them. Thus, —

Cases of Bailment. — "If A," says East, "bail goods to B, and afterwards, *animo furandi*, steal them from him, with design probably to charge him with the value, . . . the felony is complete." [6]

Goods committed to Servant. — East adds, that it is larceny "if A send his servant with money, and afterwards waylay and rob him, with intent to charge the hundred." [7] This proposition is, in principle, not reconcilable with others well established; namely, that, in these cases of larceny of one's own goods, the indictment must lay the ownership in the special owner, yet that, in the law of larceny, a servant entrusted with goods is never regarded as the special owner of them, and an indictment for stealing them cannot allege the ownership to be in him.[8]

§ 791. **Goods attached.** — If goods are attached by an officer,

[1] Reg. *v.* Bird, 9 Car. & P. 44; Jones *v.* The State, 13 Ala. 153; Reg. *v.* Jones, 2 Moody, 293; The State *v.* Wisdom, 8 Port. 511.

[2] Reg. *v.* Vincent, 2 Den. C. C. 464, 9 Eng. L. & Eq. 548.

[3] The State *v.* Koch, 4 Harring. Del. 570.

[4] Reg. *v.* Hughes, Car. & M. 593; 2 East P. C. 654; 1 Gab. Crim. Law, 600.

[5] Ward *v.* People, 3 Hill, N. Y. 395, 6 Hill, N. Y. 144. See The State *v.* Somerville, 21 Maine, 14.

[6] 2 East P. C. 654; 1 Gab. Crim. Law, 600; 1 Hale P. C. 513; 3 Inst. 110; People *v.* Thompson, 34 Cal. 671. See Commonwealth *v.* Tobin, 2 Brews. 570; Crim. Proced. II. § 720, 721. **In Civil Jurisprudence.** — So in civil jurisprudence, the person to whom property, subject to a lien, as, for instance, for freight, is committed with directions not to deliver it until the lien is discharged, may maintain an action of trespass against the general owner, who, with knowledge of these facts, takes it without permission, and without discharging the lien. Cowing *v.* Snow, 11 Mass. 415 And see Rue *v.* Perry, 63 Barb. 40.

[7] 2 East P. C. 654. And see the other authorities cited in the last note.

[8] Crim. Proced. II. § 720, 721, and note.

the latter becomes a special owner, and the general owner may commit larceny of them. Consequently, in New York, some articles having been levied on by a constable under an execution against the owner, the latter took them from the constable's possession, accused him of having wrongfully appropriated them, and sued him for their value; when the court sustained against this owner an indictment for larceny, the property being alleged to be the constable's.[1]

Intent to Steal. — In these cases, as in others, to constitute larceny there must not only be the wrongful taking, but the particular wrongful intent which the law of larceny requires.[2] Therefore the English judges were divided on the question, whether a man may be guilty of larceny of his own goods, where the intent and effect of the act are simply to defraud the crown of revenue.[3] In a Massachusetts case, on an indictment of the general owner for larceny of the goods from an attaching officer, he was permitted to show, in his defence, that his object was, not to charge the officer with their value, which would have made the transaction larceny, but to prevent other creditors from placing upon them additional attachments. This, "though unlawful, would not be larceny." Consequently he might prove that he intentionally left with the officer sufficient to satisfy the claims of the creditor whose attachment was already on them.[4]

§ 792. **Part Owner.** — By such methods as we are now considering, a man may make himself guilty of the larceny of property of which he is the part owner, even by taking it from the other part owner; though, in ordinary circumstances, it is not larceny for a part owner to convert the whole of the thing to his individual use, however wrongful may be his intent.[5]

§ 793. **Limit of Doctrine.** — On principle, we must conclude, that the doctrines of the last three sections can apply only to cases in which the person in possession sustains to the owner such a relation as to be legally chargeable with the loss of the goods,

[1] Palmer *v.* People, 10 Wend. 165; s. p. The State *v.* Dewitt, 32 Misso. 571. See, however, The State *v.* Sotherlen, Harper, 414; The State *v.* Mazyck, 3 Rich. 291. And see Brownell *v.* Manchester, 1 Pick. 232; Bond *v.* Padelford, 13 Mass. 394; Inglee *v.* Bosworth, 5 Pick. 498.

[2] People *v.* Thompson, 34 Cal. 671; The State *v.* Dewitt, 32 Misso. 571.

[3] Rex *v.* Wilkinson, Russ. & Ry. 470.

[4] Commonwealth *v.* Greene, 111 Mass. 392.

[5] Kirksey *v.* Fike, 29 Ala. 206; Reg. *v.* Webster, Leigh & C. 77; Reg. *v.* Burgess, Leigh & C. 299.

or at least to have a right of action in his own name against a third person for a trespass upon them.[1]

IV. *The Asportation.*

§ 794. **"Carried Away."** — In the language of the old definitions of larceny, the goods taken must be *carried away*.[2] But they need not be retained in the possession of the thief, neither need they be removed from the owner's premises. The doctrine is, that any removal, however slight, of the entire article, which is not attached either to the soil or to any other thing not removed, is sufficient;[3] while nothing short of this will do.[4]

§ 795. **Instantaneous Control — (Illustrations).** — Therefore if the thief has the absolute control of the thing but for an instant, the larceny is complete.[5] Thus, where one lifted a bag, which he meant to steal, from the bottom of the boot of a coach, but, before it was completely above the space it had occupied, he was detected; yet, every part of it having been raised from where the particular part had lain, this asportation was held to be sufficient.[6] And where one, with the felonious intent, seized another's pocket-book, in the vest pocket, and lifted it about three inches from the bottom of the pocket, when his operations were intercepted, this was held to be a complete larceny.[7] But the asportation was adjudged not sufficient, where a person, who was in a wagon, set a long bale upon its end, and cut the wrapper all the way down, yet was apprehended before he had taken any thing out of the bale.[8] And merely to turn over on its side a barrel of turpentine, which stood on its end, is not an adequate asportation of it, to

[1] And see 2 East P. C. 654; 1 Gab. Crim. Law, 600; Rex *v.* Bramley, Russ. & Ry. 478; Reg. *v.* Cain, 2 Moody, 204; Rex *v.* Webb, 1 Moody, 431; McDaniel's Case, 19 Howell St. Tr. 745, 803; Reg. *v.* Watts, 2 Den. C. C. 14, 1 Eng. L. & Eq. 558; Reg. *v.* Webster, Leigh & C. 77; Reg. *v.* Burgess, Leigh & C. 299.

[2] Ante, § 758, note.

[3] Rex *v.* Rawlins, 2 East P. C. 617; The State *v.* Wilson, Coxe, 439; Rex *v.* Walsh, 1 Moody, 14; Reg. *v.* Simpson, 29 Eng. L. & Eq. 530, Dears. 421, 18 Jur. 1030.

[4] Rex *v.* Cherry, 1 Leach, 4th ed. 236, note, 2 East P. C. 556; 3 Greenl. Ev. § 154; 1 Hawk. P. C. Curw. ed. p. 147, The State *v.* Jones, 65 N. C. 395.

[5] The State *v.* Jackson, 65 N. C. 305, Garris *v.* The State, 35 Ga. 247; Harrison *v.* People, 50 N. Y. 518; Eckels *v.* The State, 20 Ohio State, 508.

[6] Rex *v.* Walsh, 1 Moody, 14.

[7] Harrison *v.* People, supra.

[8] Rex *v.* Cherry, 1 Leach, 4th ed. 236, note, 2 East P. C. 556. But where the prisoner had removed a parcel of goods from the fore part to near the tail of the wagon, the asportation was held to be complete. Rex *v.* Coslet, 1 Leach, 4th ed. 236; s. c. nom. Cozlett's Case, 2 East P. C. 556.

constitute larceny.[1] Again, where goods in a shop were tied to a string, fastened at one end to the counter, a thief who carried them as far away as the string would permit was held not to have committed larceny, because of their being thus attached.[2] The same rule was applied where a purse, fastened in this way to a bunch of keys, was taken from the pocket, while the keys remained in the pocket; there was no asportation, since there was no complete severance from the person.[3] In these cases, the prisoner's control over the thing was not for an instant perfect; if it had been, it would have been sufficient, even though the control had the next instant been lost.[4] So the court held, where a man's watch and chain were forced from his pocket, but the key of the watch immediately caught and fastened itself upon a button: the larceny here was complete.[5]

§ 796. **Giving back the Property.** — A person who takes a thing feloniously does not purge the offence by handing it immediately back to the owner.[6] When, therefore, a robber, on getting the purse he demanded, returned it, saying, "If you value your purse, you will please to take it back, and give me the contents of it," but was apprehended before the money was given, he was held to have committed the crime.[7]

§ 797. **Shooting an Animal.** — Merely to shoot down, with felonious intent, a live animal, is not an asportation sufficient to constitute a larceny of the animal;[8] but, where there is no previous asportation, there must be also, it seems, some slight removal after the killing.[9] On the same principle, —

Compelling Owner to drop a Thing. — Where one stopped another carrying a bed, and told him to put it down or be shot; but, the

[1] The State *v.* Jones, 65 N. C. 395.

[2] Anonymous, 2 East P. C. 556, 1 Leach, 4th ed. 321, note.

[3] Wilkinson's Case, 1 Hale P. C. 508.

[4] And see Commonwealth *v.* Luckis, 99 Mass. 431.

[5] Reg. *v.* Simpson, 29 Eng. L. & Eq. 530, Dears. 421, 18 Jur. 1030. So, to remove an ear-ring from a lady's ear to the curls of her hair, where it lodges, is an asportation; "for it being in the possession of the prisoner for a moment, separate from the lady's person, was sufficient, although he could not retain it, but probably lost it again the same instant." Rex *v.* Lapier, 1 Leach, 4th ed. 320, 2 East P. C. 557.

[6] Roscoe Crim. Ev. 588; The State *v.* Scott, 64 N. C. 586; Georgia *v.* Kepford, 45 Iowa, 48, 52. See Rex *v.* Wright, 9 Car. & P. 554, note; Reg. *v.* Phetheon, 9 Car. & P. 552; Reg. *v.* Peters, 1 Car. & K. 245; Vol. I. § 732, 733.

[7] Rex *v.* Peat, 1 Leach, 4th ed. 228, 2 East P. C. 557.

[8] The State *v.* Seagler, 1 Rich. 30; People *v.* Murphy, 47 Cal. 103.

[9] See Rex *v.* Hogan, 1 Crawf. & Dix C. C. 366; Rex *v.* Rawlins, 2 East P. C. 617; Rex *v.* Williams, 1 Moody, 107; Rex *v.* Clay, Russ. & Ry. 387; Rex *v.* Sutton, 8 Car. & P. 291; The State *v.* Alexander, 74 N. C. 232; Lundy *v.* The State, 60 Ga. 143.

bed being put down, was arrested before he could take it up; the offence was held not to be committed.[1]

Toling Animal. — "If," said a learned Alabama judge, "one entice a horse, hog, or other animal, by placing food in such a situation as to operate on the volition of the animal, and he assumes the dominion over it, and has it once in his control, the deed is complete; but, if we suppose him detected before he has the animal under his control, yet after he has operated on its volition, the offence would not be consummated."[2]

Asportation by Agent. — If a thief, at an inn, orders another's horse to be led out, and this is done, the leading out is an asportation.[3]

Wool from Sheep — Milk from Cow. — Pulling wool from a sheep, or milking a cow, is a sufficient asportation, on a charge of stealing the wool or the milk.[4]

§ 798. **Illuminating Gas.** — Illuminating gas may be the subject of larceny.[5] And the asportation is sufficient where the prisoner, receiving gas of a gas company, diverts some of it to his burners without its passing the meter to be measured; the means employed being to use a pipe running directly from the entrance to the exit pipe.[6] While the pipe remains thus connected, there is held to be one continuous taking.[7]

V. *The Trespass.*

§ 799. **Always required.** — It is a rule, rather technical than resting on any clear reason, that there can be no larceny without a trespass.[8]

Complexity of this Rule. — Simple as this rule seems, it is practi-

[1] Farrel's Case, 2 East P. C. 557.

[2] The State *v.* Wisdom, 8 Port. 511. See Mooney *v.* The State, 8 Ala. 328; The State *v.* Martin, 12 Ire. 157; Hite *v.* The State, 9 Yerg. 198; Kemp *v.* The State, 11 Humph. 320; post, § 806.

[3] Rex *v.* Pitman, 2 Car. & P. 423. And see People *v.* Smith, 15 Cal. 408.

[4] Rex *v.* Martin, 1 Leach, 4th ed. 171, 2 East P. C. 618.

[5] Commonwealth *v.* Shaw, 4 Allen, 308.

[6] Reg. *v.* White, 20 Eng. L. & Eq. 585, Dears. 203, 3 Car. & K. 363, 22 Law J. N. S. M. C. 123, 17 Jur. 536; Commonwealth *v.* Shaw, supra.

[7] Reg. *v.* Firth, Law Rep. 1 C. C. 172.

[8] 1 Hawk. P. C. Curw. ed. p. 142, § 1; Rex *v.* Raven, J. Kel. 24; Pennsylvania *v.* Campbell, Addison, 232; The State *v.* Braden, 2 Tenn. 68; Hite *v.* The State, 9 Yerg. 198; Wright *v.* The State, 5 Yerg. 154; Rex *v.* Hart, 6 Car. & P. 106; Reg. *v.* Frampton, 2 Car. & K. 47; Cartwright *v.* Green, 8 Ves. 405, 2 Leach, 4th ed. 952; Morehead *v.* The State, 9 Humph. 635; Robinson *v.* The State, 1 Coldw. 120; The State *v.* Newman, 9 Nev. 48.

cally very complex. Multitudes of questions have arisen upon it, — cases almost without number relating to it have passed to judgment, — and it has become the main topic under the title Larceny. The relations of the parties to each other and to the property are so varying, — they involve so many nice differences and similitudes, — so many cases are on the border line between differing classes, that only by adopting some minor rules of a very technical sort could the courts surmount encompassing difficulties, and open the way to any thing like uniformity of decision.

§ 800. **Other Crime where no Trespass.** — Although, in cases in which there is no trespass, there is no larceny, yet the fraudulent transaction may constitute some other crime. Thus, —

Embezzlement. — It was to make punishable acts of misappropriation where there was no trespass, that the statutes against embezzlement were passed. And as those statutes have been found from time to time defective, they have been amended, and their scope has been enlarged.[1] So, —

Cheats and False Pretences. — To provide for certain other classes of the fraudulent obtaining and appropriating of property, we have the common-law doctrine of cheat, and the statutes against obtaining money or goods by false pretences. And —

Still other Offences. — There are, known to the law, some other offences, the gist of which perhaps is the wrong-doer's getting into his possession, under special circumstances, and misusing, for his own benefit or to another's injury, property to which he is not entitled.

§ 801. **Trespass and Felonious Intent concur in Time.** — Moreover, from the principle according to which an act and intent, concurrent in point of time, are necessary to constitute every common-law offence,[2] comes the doctrine, that, in larceny, the trespass, or rather the asportation by trespass, must be simultaneous with the intent to steal.[3] Thus, —

[1] And see Stat. Crimes, § 417–425.

[2] Vol. I. § 204 et seq.

[3] Vol. I. § 207; Rex *v.* Charlewood, 1 Leach, 4th ed. 409, 2 East P. C. 689; Rex *v.* Leigh, 2 East P. C. 694, 1 Leach, 4th ed. 411, note; Reg. *v.* Box, 9 Car. & P. 126; The State *v.* Smith, 2 Tyler, 272; People *v.* Reynolds, 2 Mich. 422; Booth *v.* Commonwealth, 4 Grat. 525; Rex *v.* Mucklow, 1 Moody, 160, Car. Crim. Law, 3d ed. 280; Reg. *v.* Riley, 14 Eng. L. & Eq. 544, Dears. 149, 17 Jur. 189; Reg. *v.* Goodbody, 8 Car. & P. 665; Reg. *v.* Glass, 1 Den. C. C. 215, 2 Car. & K. 395; Reg. *v.* Brooks, 8 Car. & P. 295; Blunt *v.* Commonwealth, 4 Leigh, 689;

§ 802. **Intent to Steal subsequent to Taking — (Bank-notes to keep).** — One who took innocently into his possession some bank-notes from another to keep, but afterward denied all knowledge of them, was held — in a case where no subsequent act was shown — not to be guilty of larceny.[1] And —

Post-letter enclosing Money. — Where one innocently received through the post-office a letter, meant for another person of the same name with himself, enclosing a check, and wrongfully appropriated the check to his own use, he was held not to be guilty of this offence,[2] — the intent to steal not having come upon him until after the innocent taking.

§ 803. **How this Sub-title divided.** — To give order to the minuter consideration of the subject of this sub-title, let us inquire into, First, The kind of force requisite; Secondly, The effect of a consent to the taking; Thirdly, The possession of the property which the owner must have, and the thief must not, in order for the trespass to attach. We shall thus gain a general knowledge of doctrines; but further illustrations will appear in the sub-title after the next.

§ 804. First. *The Kind of Force requisite:* —

Physical — (Illustrations). — The taking by trespass ordinarily involves the idea of *physical force*[3] applied to the thing taken; as, where one pulls wool from a sheep, milks a cow,[4] or snatches from another person a parcel.[5]

Secret or Open — Day or Night. — Whether the force be secret or open, in the day or in the night, is immaterial, except as manifesting under particular circumstances the intent.[6]

§ 805. **Perversion of Legal Process.** — The necessary physical

Fulton *v.* The State, 8 Eng. 168; Keely *v.* The State, 14 Ind. 36; Wilson *v.* People, 39 N. Y. 459.

[1] Reg. *v.* Brennan, 1 Crawf. & Dix C. C. 560, Bushe, C. J., observing: "If the prisoner at the time of getting the notes, had the *animus* of keeping them, then there would have been a sufficient taking; but here the evidence is the other way, for the prosecutor voluntarily gave the notes to the prisoner."

[2] Rex *v.* Mucklow, 1 Moody, 160, Car. Crim. Law, 3d ed. 280. And see Reg. *v.* Glass, 1 Den. C. C. 215, 2 Car. & K. 395; Reg. *v.* Brooks, 8 Car. & P. 295; People *v.* McGarren, 17 Wend. 460; Reg. *v.* Davies, Dears. 640, 36 Eng. L. & Eq. 607. See post, § 824, 825.

[3] See Vol. I. § 574 et seq.

[4] Rex *v.* Martin, 1 Leach, 4th ed. 171, 2 East P. C. 618; ante, § 797.

[5] Rex *v.* Macauley, 1 Leach, 4th ed. 287; Rex *v.* Robins, 1 Leach, 4th ed. 290, note; Vaughn *v.* Commonwealth, 10 Grat. 758; Johnson *v.* Commonwealth, 24 Grat. 555; The State *v.* Henderson, 66 N. C. 627.

[6] Pennsylvania *v.* Becomb, Addison, 386; McDaniel *v.* The State, 8 Sm. & M. 401, 418; 1 Hale P. C. 509; The State *v.* Fisher, 70 N. C. 78; post, § 842, note.

force may be exercised through a fraudulent perversion of legal process.[1] Says Lord Hale: "A hath a mind to get the goods of B into his possession; privately delivers an ejectment, and obtains judgment against a casual ejector, and thereby gets possession and takes the goods; if it were *animo furandi*, it is larceny."[2] And Coke: "If a man, seeing the horse of B in his pasture, and, having a mind to steal him, cometh to the sheriff, and pretending the horse to be his obtaineth the horse to be delivered unto him by replevin, yet this is a felonious and fraudulent taking."[3]

§ 806. **In Larceny of Animals.** — When the larceny is of a domestic animal, like a horse, the trespass is sufficient if the animal is ridden, driven, or led away.[4] And doubtless the same is true, if it is toled away by food, or by the voice, so as to come under the control of the thief.[5] Under former statutes against the larceny of slaves, an effectual enticement only was required;[6] and, on this whole matter, a learned judge has said: "With inanimate subjects of larceny, force may be necessary, and must be used; but is there any thing in reason or common sense which requires it as to those subjects of larceny which possess volition and locomotion? Is not the idea, as to both, the deprivation which the owner of the property sustains? Suppose a horse or a dog to be toled out of the possession of the owner by corn, is not this as much a taking and carrying away as the shouldering of a bale of goods would be? I confess I can see no substantial legal difference."[7]

§ 807. **Mental Force.** — Hence it follows, that, when the thing

[1] Rex *v.* Summers, 3 Salk. 194; Rex *v.* Gardiner, J. Kel. 46; Commonwealth *v.* Low, Thacher Crim. Cas. 477; Farr's Case, J. Kel. 43, 2 East P. C. 660. See Vol. I. § 564.

[2] 1 Hale P. C. 507. In Rex *v.* Summers, 3 Salk. 194, the case was: "Where a man who had no manner of title to a house brought an *ejectment*, and procured an *affidavit* to be filed of the delivery of the declaration to the tenant in possession, and, for want of appearing and pleading, got judgment at his own suit, and then sued out an *habere facias possessionem*, and got a warrant thereon from the high bailiff of Westminster, directed to one of his bailiffs, who, with the plaintiff himself, turned the defendant out of possession, and seized all the goods, and converted them to his own use; this was adjudged felony, for which he was indicted, convicted, and executed, for he made use of the process of the law for a felonious purpose."

[3] 3 Inst. 108.

[4] Baldwin *v.* People, 1 Scam. 304; The State *v.* Gazell, 30 Misso. 92; ante, § 797.

[5] Ante, § 797.

[6] The State *v.* Hawkins, 8 Port. 461; The State *v.* Whyte, 2 Nott & McC. 174. And see The State *v.* Wisdom, 8 Port. 511; Mooney *v.* The State, 8 Ala. 328; The State *v.* Brown, 3 Strob. 508, 516; ante, § 797.

[7] The State *v.* Whyte, 2 Nott & McC. 174, 177, Colcock, J.

to be stolen is an animal, having the power of locomotion and susceptible of enticement, the application of mental force to it is sufficient. And, in some circumstances, the application of the like force to the intelligent owner of a thing will suffice. Thus, —

Moving the Fears. — East, speaking of robbery, which includes larceny,[1] observes, that "a colorable gift, which in truth was extorted by fear, amounts to a taking and trespass in law,"[2] — the thing coming, in such a case, under the control of the person to whom it is given. The doctrine is, that, where one transfers the manual control of the article to another, through fear, the larceny by such other, which constitutes a part of the robbery, is complete.[3] But the reason of this would seem to be, that the consent to the taking was made null by the fear which the thief had excited, and the case was the same as though there had been no consent. And this explains why, when a man laid down a bed through fear,[4] there was no larceny; the thief not taking it into his possession.

§ 808. **Fraud.** — Fraud, like the practices which excite fear, renders the transaction into which it enters void.[5] If, therefore, one meaning to steal an article procures, by fraudulent devices, the owner to deliver it to him, does he commit, in law, the crime of larceny? In reason, and aside from technical rule, he does. But the authorities have established, too firmly to be overthrown by judicial power, the following distinction: —

Property in Goods to pass. — If, by fraud, a person is induced to part with his goods, meaning to relinquish his property in them as well as his possession, he who thus obtains them may be chargeable with a cheat at the common law,[6] or under the statutes against false pretences,[7] but not with larceny; because, it is assumed, the owner having actually consented to part with his ownership, there was no trespass in the taking.[8]

[1] Vol. I. § 566, 1055.

[2] 2 East P. C. 711.

[3] Rex *v.* Taplin, 2 East P. C. 712; Rex *v.* Blackham, 2 East P. C. 711; Reg. *v.* Hazell, 11 Cox C. C. 597; Reg. *v.* McGrath, Law Rep. 1 C. C. 205, 11 Cox C. C. 347. And see Vol. I. § 329, 438, 581, 748.

[4] Ante, § 797.

[5] Bishop First Book, § 66–69, 124, 125.

[6] Ante, § 143 et seq.

[7] Ante, § 409 et seq.

[8] Vol. I. § 581–583; Post, § 811; Smith *v.* People, 53 N. Y. 111; The State *v.* Shoaf, 68 N. C. 375. See, as perhaps bringing to view distinctions of some consequence, Reg. *v.* Morgan, Dears. 395, 29 Eng. L. & Eq. 543. And see People *v.* Jackson, 3 Parker C. C. 590. But the distinctions appearing in these cases are probably sufficiently explained in subsequent sections of the text. And see post, § 815, 816.

§ 809. **Possession, without Property, to pass.** — But, to repeat, the doctrine thus stated refers only to cases in which the ownership of the goods is meant, by the owner, to pass with them.[1] And if one consents to part with merely the possession, and another, who takes the goods, intends a theft, the latter, without reference to the question of fraud, goes beyond the consent, and commits this offence.[2]

§ 810. **Illustrations.** — In illustration of the distinction thus stated, —

False Playing for Money. — If a man plays at hiding under the hat, and so voluntarily stakes his money on the event, meaning to receive the stake if he wins, and pay if he loses; then, if, by a conspiracy, his adversary is falsely made to appear to win, and thereupon takes up the stake, no objection being interposed; this taking of it is not larceny, though the intent should be felonious.[3] But if the man had not consented to play on his own account, and had played only for one of the conspirators; then, if the conspirators had taken his money, under the pretence of his having agreed and their having won, their offence would be larceny;[4] because, although they used fraud, yet not it, but the physical force, got the money.[5]

Further of this Distinction. — This very nice distinction, resting on a plain technical rule, which, on examination, appears not to be sound, has not been applied in a quite uniform way by the courts, and there are some conflicts in the decisions upon it. We shall now proceed, under the second division of our present subtitle, to illustrate it further.

§ 811. Secondly. *Consent to the Taking:* —

No Larceny. — There can be no trespass, consequently no larceny, where there is a consent to the taking.[6]

[1] 2 East P. C. 668; The State *v.* Lindenthall, 5 Rich. 237; Ross *v.* People, 5 Hill, N. Y. 294; Mowrey *v.* Walsh, 8 Cow. 238; Lewer *v.* Commonwealth, 15 S. & R. 93; Rex *v.* Hench, Russ. & Ry. 163; Rex *v.* Adams, Russ. & Ry. 225.

[2] Post, § 813, 814.

[3] Rex *v.* Nicholson, 2 Leach, 4th ed. 610, 2 East P. C. 669. If he had agreed to part with only the possession, it would have been otherwise. Rex *v.* Robson, Russ. & Ry. 413. See post, § 813.

[4] Rex *v.* Horner, 1 Leach, 4th ed. 270.

[5] **Wager and Conspiracy.** — In like manner, where one was induced by a conspiracy of three fellow passengers in a railroad car to make a wager with one of them, and he deposited his stake with another of them, who, upon his discovering that the opposite stake was only waste paper, refused to give it up, the three were held to be guilty of larceny. Stinson *v.* People, 43 Ill. 397.

[6] Vol. I. § 258–263; 2 East P. C. 665, 666, 816; Witt *v.* The State, 9 Misso. 663; Dodge *v.* Brittain, Meigs, 84; Dodd

Obtained by Fraud. — And, as we have just seen, the further theory on which this branch of the law of larceny proceeds is, that, where the consent is as broad as the taking, going to the relinquishment of the ownership in the property, it is effectual though obtained by fraud; in other words, by reason of the consent, even when procured by fraud, there is still no trespass, therefore no larceny.[1] Thus, —

§ 812. **Making or procuring Change.** — According to the more common doctrine, and in ordinary circumstances, if one takes another's money by the latter's permission or request, to return its value in change (that is, to change it or get it changed), but retains the money and refuses to deliver the change, he does not commit larceny; because, when the owner of the money relinquished his possession, he did not contemplate receiving it back, but parted with his ownership therein.[2] But the facts of cases differ, and perhaps the views of judges are not quite harmonious. Accord-

v. Hamilton, N. C. Term R. 31; The State *v.* Jernagan, N. C. Term R. 44; Reg. *v.* Jones, Car. & M. 611. **Part Consent. — Matches.** — If the owner of a store places on his counter a box of matches to be used by the public in lighting cigars, still a taking of the whole boxful, with felonious intent, is larceny. Mitchum *v.* The State, 45 Ala. 29.

[1] 2 East P. C. 668; Lewer *v.* Commonwealth, 15 S. & R. 93; Rex *v.* Summers, 3 Salk. 194; Anonymous, J. Kel. 35, 81, 82; ante, § 813; post, § 818.

[2] Rex *v.* Coleman, 2 East P. C. 672; Rex *v.* Sullens, 1 Moody, 129; Reg. *v.* Thomas, 9 Car. & P. 741; Reg. *v.* Reynolds, 2 Cox C. C. 170; Reg. *v.* Bird, 12 Cox C. C. 257, 4 Eng. Rep. 533; Reg. *v.* Jacobs, 12 Cox C. C. 151, 2 Eng. Rep. 204; Reg. *v.* Slingsby, 4 Fost. & F. 61. And see Rex *v.* Walsh, Russ. & Ry. 215, 2 Leach, 4th ed. 1054, 4 Taunt. 258. **Doctrines distinguished.** — The doctrine of these cases runs very close to that of Rex *v.* Aickles, 2 East P. C. 675, 1 Leach, 4th ed. 294; Rex *v.* Oliver, 2 Russ. Crimes, 3d Eng. ed. 43; and other cases cited post, § 817; in which the contrary result was obtained. The test is, whether, when the thing was delivered, the property in it was intended to pass then, or not until something further was done. If the former, it is not larceny; if the latter, it is. In a later English case it appeared, that the prisoner stationed himself near the pay-place at a railroad ticket-office, where there was a crowd, to allure people to trust him with their money to procure tickets, intending to appropriate the money to his own use. A lady asked him to get a ticket for her, the fare being 10*s.*, and she handed him a sovereign, for which she expected to receive the ticket and the change. Instead of getting the ticket, he ran away with the sovereign; and it was held, that he was rightly convicted of the larceny of "one pound in money." At the hearing, Williams, J., said: **Taking from Contribution-box.** — "There was a case tried before Maule, J. [not reported], where the clerk was sent round in church with a plate to collect the sacrament-money. One of the congregation put a half-crown into the plate, which the clerk took out; and it was held that he was rightly convicted of larceny on a count which laid the property in the half-crown in the person who put it into the plate." Reg. *v.* Thompson, Leigh & C. 225, 328. See also Reg. *v.* Robson, Leigh & C. 93; Commonwealth *v.* Barry, 124 Mass. 325.

ing to what seems to be sound in law and in fact, if a man standing by a counter lays down a bank-bill and expects change in return, he parts with the possession of the bill only conditionally; namely, on the condition that change is given for it. In the words of Church, C. J., in a New York case, "the delivery of the bill and the giving change were to be simultaneous acts, and until the latter was paid the delivery was not complete." Then, if the person at the counter feloniously picks up the bill and refuses the change, he commits larceny.[1] Again, —

Money by False Letter — Personating. — If one obtains money by means of a false letter in a third person's name,[2] or by personating such third person,[3] he does not commit larceny, whatever his intent may be; because the person parting with the money meant to relinquish both ownership and possession. So, —

By other False Pretence. — Where a servant, whose duty it was to purchase kitchen stuff for his master in the absence of the clerk, falsely pretended to the clerk that he had bought stuff for a sum which he demanded, and it was paid him out of the master's funds; the court held, that, as the money was voluntarily parted with, and was not to be returned, the transaction was an indictable false pretence under the statute, but it was not larceny.[4] And where one got possession of a hat, which a third person had ordered of the maker, by sending a boy for it in the third person's name, he was held not to be guilty of larceny;[5] the understanding having been, that the property in the hat should pass by this delivery.[6]

Limit of this Doctrine. — But there is a distinction, which seems apparently to limit this doctrine, important to be borne in mind.

[1] Hildebrand *v.* People, 56 N. Y. 394, 396, 3 Thomp. & C. 82; s.c. nom. Hilderbrand *v.* People, 1 Hun, 19; Reg. *v.* McKale, Law Rep. 1 C. C. 125, 11 Cox C. C. 32. And see Reg. *v.* Gemmell, 26 U. C. Q. B. 312; Weyman *v.* People, 6 Thomp. & C. 696, 4 Hun, 511. And see the last note and post, § 817.

[2] Rex *v.* Atkinson, 2 East P. C. 673.

[3] Williams *v.* The State, 49 Ind. 367.

[4] Reg. *v.* Barnes, Temp. & M. 387, 2 Den. C. C. 59, 1 Eng. L. & Eq. 579; s. p. Reg *v.* Thompson, Leigh & C. 233, 9 Cox C. C. 222. See Reg. *v.* Goodenough, 25 Eng. L. & Eq. 572, Dears. 210 post, § 813.

[5] Rex *v.* Adams, Russ. & Ry. 225. See Rex *v.* Wilkins, 1 Leach, 4th ed. 520, 2 East P. C. 673, which may be deemed to have turned on the want of authority in the apprentice to part with the goods, at the place and to the person he did. See also Reg. *v.* Kay, 7 Cox C. C. 289, Dears. & B. 231.

[6] And see Reg. *v.* Adams, 1 Den. C. C. 38. Rex *v.* Cockwaine, 1 Leach, 4th ed. 498, seems to have turned on the form of the special verdict. See also Reg. *v* North, 8 Cox C. C. 433.

If the person parting with the goods was not their owner, but was a servant or bailee with no authority to transfer the ownership to the thief, then, as the latter could not become their owner even though he had used no fraud, his taking of them through fraud with a felonious intent is larceny.[1] Thus, —

Watch from Shop of Repairer. — If one, knowing that a watch has been left at a shop for repair, personates the owner and gets the watch, with felonious intent, he commits larceny; because the proprietor of the shop had no authority to transfer the title or even the possession to him.[2] Again, —

Other Delivery to Wrong Person. — If a cart-man, carrier, post-office clerk, or other person of the like sort, delivers an article to the wrong person by mistake, or in consequence of fraud practised by the latter, who converts it to his own use with felonious intent, this taking is a larceny.[3]

§ 813. **Parting with Possession only.** — And, though the person operated on by the fraud should be the owner of the goods, or an agent authorized to transfer the ownership in them, still, if, in fact, the transaction would have constituted, had it not been fraudulent, a transfer of the mere possession, or a mere special property, but not the ownership, the taking through this fraud, and with the intent to steal, will, as we have already seen, be larceny.[4] The reason is, that larceny is committed only when the aim of the thief is to divest the owner of his ownership, in distinction from the mere use or temporary possession;[5] so that a consent which comes short of this necessary intent does not cover the whole ground of the taking, and avails nothing. For example, —

Illustrations — (Hiring Horse — Loan of Chattel — Mail-bags — False Order — Article to Deliver, &c.). — If, with felonious mind,

[1] And see post, § 822.

[2] Commonwealth *v.* Collins, 12 Allen, 181.

[3] Reg. *v.* Little, 10 Cox C. C. 559; Reg. *v.* Gillings, 1 Fost. & F. 36; Reg. *v.* Webb, 5 Cox C. C. 154; The State *v.* McCartey, 17 Minn. 76; Bassett *v.* Spofford, 45 N. Y. 387; The State *v.* Brown, 25 Iowa, 561; Commonwealth *v.* Lawless, 103 Mass. 425; Reg. *v.* Simpson, 2 Cox C. C. 235. See Reg. *v.* Brackett, 4 Cox C. C. 274; post, § 822.

[4] Vol I. § 583; 2 East P. C. 668, 816; Lewer *v.* Commonwealth, 15 S. & R. 93; Rex *v.* Standley, Russ. & Ry. 305; The State *v.* Watson, 41 N. H. 533; The State *v.* Humphrey, 32 Vt. 569; Welsh *v.* People, 17 Ill. 339; Smith *v.* People, 53 N. Y. 111; Weyman *v.* People, 6 Thomp. & C. 696, 4 Hun, 511; Commonwealth *v.* Smith, 1 Pa. Law Jour. Rep. 400; The State *v.* Jarvis, 63 N. C. 556; Reg. *v.* Wells, 1 Fost. & F. 109; Reg *v.* Waller, 10 Cox C. C. 360.

[5] Vol. I. § 579; post, § 841.

one borrows or hires a horse or carriage, as he pretends, to ride;[1] or gets the loan of any other chattel;[2] or gets from a person in the post-office a delivery of the mail-bags;[3] or obtains an article of merchandise on a false order or other false pretence, where the possession[4] and not the property[5] is to be parted with; or receives an article of clothing to deliver to a washerwoman;[6] or a sum of money with which to pay a bill for the other;[7] his concurrent intent being, let us still remember, to steal the thing;[8] he commits, notwithstanding this consent of the owner, the crime of larceny. So also —

Color of Bet. — If there is a plan to cheat a man of his property under color of a bet, and he parts with only the possession to deposit as a stake with one of the confederates; the taking by such confederate is larceny, and not the less so though afterward the confederates are by fraud made to appear to win.[9]

§ 814. **Exception in Tennessee.** — In Tennessee, the foregoing doctrine is not received; but, by the common law of this State, there is no larceny, though the consent of the owner is to part with only the possession. Therefore if one there, fraudulently and with intent to steal, gets another's property under the pretence of hiring it, he does not commit this offence.[10]

§ 815. **Condition precedent.** — Since the consent to the taking must, to avail an accused person, be as broad as the act it would protect,[11] if, by its terms, it is on a condition precedent, — that is,

[1] The State *v.* Gorman, 2 Nott & McC. 90; Rex *v.* Semple, 1 Leach, 4th ed. 420, 2 East P. C. 691; Rex *v.* Pear, 1 Leach, 4th ed. 212, 2 East P. C. 685, 697; Rex *v.* Tunnard, 2 East P. C. 687, 1 Leach, 4th ed. 214, note; The State *v.* Humphrey, supra; Reg. *v.* Cole, 2 Cox C. C. 340.

[2] Starkie *v.* Commonwealth, 7 Leigh, 752.

[3] Rex *v.* Pearce, 2 East P. C. 603.

[4] Rex *v.* Hench, Russ. & Ry. 163; The State *v.* Lindenthall, 5 Rich. 237.

[5] Ante, § 809, 811; Rex *v.* Adams, Russ. & Ry. 225; Reg. *v.* Adams, 1 Den. C. C. 38; Rex *v.* Atkinson, 2 East P. C. 673. **Intending to part with Ownership ultimately, not now.** — When one, with intent to steal, gets from another a bank-note, to deposit in a bank, he commits larceny of the note; Rex *v.* Goode, 2 Car. & P. 422, note; because, although the person defrauded intends ultimately to part with his property in the particular note, yet he does not mean to part with it at the time he delivers it, nor to the individual to whom he delivers it. See also Reg. *v.* Smith, 1 Car. & K. 423.

[6] Reg. *v.* Evans, Car. & M. 632. And see Rex *v.* Stock, 1 Moody, 87; Reg. *v.* Glass, 2 Car. & K. 395.

[7] Reg. *v.* Brown, Dears. 616; Reg. *v.* Smith, 1 Car. & K. 423. And see Reg. *v.* Beaman, Car. & M. 595; Rex *v.* Murray, 1 Leach, 4th ed. 344, 2 East P. C. 683; Reg. *v.* Butler, 2 Car. & K. 340; Reg. *v.* Heath, 2 Moody, 33; Reg. *v.* Goodenough, Dears. 210, 25 Eng. L. & Eq. 572.

[8] Ante, § 801.

[9] Rex *v.* Robson, Russ. & Ry. 418. See ante, § 810.

[10] Felter *v.* The State, 9 Yerg. 397.

[11] Ante, § 813.

if something is to be done before the property passes, — the taking, with felonious intent, will be larceny. Thus, —

Goods for Cash. — If, on a sale of goods, no credit is intended by the seller, while the purchaser secretly contemplates appropriating them to himself without paying for them, a delivery will not protect him from the charge of larceny; otherwise, if there is a credit.[1]

§ 816. **Continued.** — The following will illustrate the application of this doctrine. In one case, the prisoner went into a shop, and purchased jewelry to pay in cash on its delivery at a coach-office. The seller made out an invoice, and took the goods to the coach-office; where, being met by the prisoner, the latter said, he had been disappointed in not receiving money expected by letter. Just then a letter was put into his hands: he opened it in the presence of the seller, and said, he had to meet, at a certain coffee-house, at seven, a friend who would supply the money. So the seller left the goods and went home. He testified, that he considered them sold when he got the cash, not before. The prisoner absconded with them. The jury were instructed, to consider, whether the prisoner had any intention of buying and paying for the goods, or whether he ordered them merely to get possession of them, and convert them to his own use. They found the latter to be the fact, and convicted the prisoner, and the judges held the conviction to be right.[2] In another case, one bargaining with a trader about some waistcoats, said, "You must go to the lowest price, as it will be for ready money." The reply was, "Then you shall have them for 12*s.*;" to which the purchaser assented, and remarked, that he would put them into his gig, standing at the door. The trader replied, "Very well." He put them into the gig, drove off without paying, and was absent two years. The jury, trying him for larceny, returned for their verdict, specially: "In our opinion, the waistcoats were parted with conditionally, that the money was to be paid at the time, and that the defendant took them with a felonious intent." And the judges held, that he was rightly convicted. "This is an express finding of the jury," they said, "that the

[1] 2 East P. C. 693. And see the cases cited to the next section. Also Mowrey *v.* Walsh, 8 Cow. 238; Ross *v.* People, 5 Hill, N. Y. 294.

[2] Rex *v.* Campbell, 1 Moody, 179.

prosecutor only parted with the possession of the goods."[1] The same result is arrived at, where, by usage, goods bought are to be paid for before they are taken away; and the pretended purchaser, without consent, takes them feloniously, and does not pay.[2] But though the trader intends not to let the purchaser have the goods except for money, yet, if he finally parts with them for bills, the transaction, however fraudulent, is not larceny.[3]

§ 817. **Change, again.** — Where one asked a boy in a shop to give him change for half a crown; presenting it to the boy, who touched it, but did not get hold of it; he was held, having received the change before he reached out the half-crown, to have committed larceny of the change.[4]

§ 818. **Civil Right to reclaim Goods, distinguished.** — The reader should distinguish between cases of larceny, and civil cases in which the seller undertakes to reclaim goods alleged to have been obtained of him by fraud. Under many circumstances the purchaser's fraud enables the seller to get back the goods, while yet the consent he had given to part with them avails the defendant on a charge of larceny.[5] For, as concerns this crime, and the

[1] Reg. *v.* Cohen, 2 Den. C. C. 249, 5 Eng. L. & Eq. 545. And see Reg. *v.* Box, 9 Car. & P. 126; Rex *v.* Pratt, 1 Moody, 250; Rex *v.* Sharpless, 1 Leach, 4th ed. 92. Query, whether these cases overrule the doctrine of Rex *v.* Harvey, 1 Leach, 4th ed. 467, 2 East P. C. 669, in which it was held, that, if a horse is purchased and delivered to the buyer, who is to pay for it immediately, the latter does not commit larceny of the horse though he rides away with it without objection from the seller, saying he will return immediately and pay for it. The court expressly observed: "The property, as well as the possession, was entirely parted with." And see Reg. *v.* Sheppard, 9 Car. & P. 121; People *v.* Miller, 14 Johns. 371.

[2] Rex *v.* Gilbert, 1 Moody, 185. And see Reg. *v.* Slowly, 12 Cox C. C. 269, 4 Eng. Rep. 545. A person went into a shop, and told the clerk he wished to purchase a particular chattel. The clerk referred him to the shopkeeper, who refused to let him have it, except on his father's order. Afterward he entered the shop, in the shopkeeper's absence, without the order, asked again to see the chattel, told the clerk he had made all right with the shopkeeper, and carried it away. These facts were held to support a conviction for larceny. Commonwealth *v.* Wilde, 5 Gray, 83.

[3] Rex *v.* Parkes, 2 Leach, 4th ed. 614; s. c. nom. Rex *v.* Parks, 2 East P. C. 671.

[4] Rex *v.* Williams, 6 Car. & P. 390. Much to the same effect are Reg. *v.* Rodway, 9 Car. & P. 784; Rex *v.* Aickles, 2 East P. C. 675, 1 Leach, 4th ed. 294; Rex *v.* Oliver, 2 Russ. Crimes, 3d Eng. ed. 43, cited 2 Leach, 4th ed. 1072, 4 Taunt. 274; Reg. *v.* Johnson, 2 Den. C. C. 310, 14 Eng. L. & Eq. 570; Rex *v.* Metcalf, 1 Moody, 433; Prosser *v.* Rowe, 2 Car. & P. 421; Reg. *v.* Twist, 12 Cox C. C. 509, 6 Eng. Rep. 335. See ante, § 812 and note.

[5] Ross *v.* People, 5 Hill, N. Y. 294. And see Olmsted *v.* Hotailing, 1 Hill, N. Y. 317.

trespass necessary to constitute it, a consent to the taking is the same whether obtained by fraud or not.[1]

§ 819. **Ring-dropping.** — Another illustration of the doctrine, that, to prevent the felonious taking from being larceny, the consent must embrace the property in the thing, as well as the possession of it,[2] occurs in cases of what is called ring-dropping. A person, having pretended to find an article of value, — as a ring, with a jewel in it, which is worthless, but appears to be of diamond, — induces another, acknowledged to have a right to share in the prize, to let him have bank-bills or other thing on security of the article found; under the condition, that it shall belong entirely to the lender, if what is borrowed is not restored in such a time. Here, as the specific article borrowed was to be returned, the taking of it, with felonious intent, is larceny.[3] But where, also, in a case of ring-dropping, the prisoner had prevailed on the prosecutor to buy his share of the pretended prize, which was done, the offence was deemed not to be larceny; because the prosecutor had parted with his property in the money he gave, not merely with his possession.[4]

§ 820. **Exchange of Pledge with Pawnbroker.** — Again, if a pawnbroker delivers back to the pawner a pledge, on receiving from him another which he thinks has been shown him, and is of sufficient value, but really is a worthless thing substituted by sleight of hand for the article shown, — the pawner, committing this cheat, cannot be holden for a larceny of the pledge taken back; because the other, in relinquishing it, meant to part with his property therein.[5] And where the prisoner took a packet of diamonds to a pawnbroker, with whom he had previously pledged a brooch, and received the brooch and a further advance, pretending to give this packet, but really giving another, of similar appearance, containing only glass, his offence was held not to be larceny, but merely an indictable cheat.[6]

§ 821. **Consent, to detect Thief.** — The cases wherein a party

[1] See Vol. I. § 581–583; ante, § 811, 812.

[2] Ante, § 813.

[3] Rex *v.* Watson, 2 Leach, 4th ed. 640, 2 East P. C. 680; Rex *v.* Patch, 1 Leach, 4th ed. 238, 2 East P. C. 678; Rex *v.* Marsh, 1 Leach, 4th ed. 345; Rex *v.* Moore, 1 Leach, 4th ed. 314, 2 East P. C. 679. See Reg. *v.* Hazell, 11 Cox C. C. 597.

[4] Reg. *v.* Wilson, 8 Car. & P. 111. See Reg. *v.* Gardner, Leigh & C. 243, 9 Cox C. C. 253.

[5] Rex *v.* Jackson, 1 Moody, 119.

[6] Rex *v.* Meilheim, Car. Crim. Law, 3d ed. 281.

consents to the taking, in order to detect and bring to punishment the thief, were discussed in the preceding volume.[1]

§ 822. **Consent through Agent.** — Another proposition, already in a measure brought to view,[2] is, that the consent to the appropriation of the thing is the same whether coming directly from the principal, or indirectly through an agent; but, if through an agent, he must be authorized to give it. For example, —

Authorized or not. — If, during slavery, one with felonious intent took the master's goods from a consenting slave, he was held to commit larceny of them or not, according as the master had[3] or had not[4] told the slave to deliver them. So the getting of a parcel from a carrier's servant, by falsely pretending to be the person to whom it is directed, is larceny, if taken with the intent to steal; because the servant has no authority to part with it except to the right person.[5] And if a man's servant delivers unauthorized his goods, under a pretended sale, to one who, knowing the want of authority, takes them with felonious intent, this one commits larceny of them.[6] The doctrine seems broadly to be, that a thief can avail himself of a permission given by the owner's agent, only when the agent had authority. The authority may be either general or special.[7]

§ 823. Thirdly. *The Possession of the Property which the Owner must have, and the Thief must not, in order for the Trespass to attach:* —

Must be Possession. — There can be no trespass in taking goods from one in whose possession they are not.[8] Thus, —

Money drawn on another's Check. — If a stockbroker, authorized to draw money on his principal's check for a particular purpose, draws and misappropriates it, he does not thereby commit larceny

[1] Vol. I. § 262, 263.

[2] Ante, § 812.

[3] Dodge *v.* Brittain, Meigs, 84; Vol. I. § 262, 263. And see Kemp *v.* The State, 11 Humph. 320.

[4] Hite *v.* The State, 9 Yerg. 198.

[5] Rex *v.* Longstreeth, 1 Moody, 137.

[6] Rex *v.* Hornby, 1 Car. & K. 305. And see Reg. *v.* Harvey, 9 Car. & P. 353.

[7] Reg. *v.* Sheppard, 9 Car. & P. 121; Rex *v.* Small, 8 Car. & P. 46; Rex *v.* Jackson, 1 Moody, 119; Rex *v.* Wilkins, 1 Leach, 4th ed. 520, 2 East P. C. 673; Rex *v.* Parkes, 2 Leach, 4th ed. 614; s. c. nom. Rex *v.* Parks, 2 East P. C. 671; Rex *v.* Pratt, 1 Moody, 250; Reg. *v.* Featherstone, Dears. 369, 26 Eng. L. & Eq. 570, 18 Jur. 538.

[8] Rex *v.* Hart, 6 Car. & P. 106; Reg. *v.* Smith, 2 Den. C. C. 449, 9 Eng. L. & Eq. 532; Reg. *v.* Johnson, 2 Den. C. C. 310, 14 Eng. L. & Eq. 570; Rex *v.* Hawtin, 7 Car. & P. 281; Nelson *v.* Whetmore, 1 Rich. 318; The State *v.* Martin, 12 Ire. 157; Gadson *v.* The State, 36 Texas, 350; Garner *v.* The State, 36 Texas, 693; Rex *v.* Adams, Russ. & Ry. 225.

of the money; for it was never in the principal's possession.[1] And a servant who, taking his master's check to a bank for the cash, conceives there the idea of converting to his own use the bank bills when drawn, does not commit larceny by thus misappropriating them; for, in the language of the judge, "those bills had never been in the possession of the master, in any such sense as would authorize him to sue the servant in trespass for them. The bank-bills delivered to the servant were not the bills of the master while in the bank; they were the money of the bank, and, as such, were delivered to the servant; and never came to the hands of the master, or were held by him." [2]

§ 824. **Possession and Custody distinguished.** — There is a difference between a custody and a possession. For example, —

Servant's Possession — Larceny by Servant. — Goods in the custody of a servant are in the possession of the master. The servant may, therefore, commit larceny of them;[3] as, if a clerk in a store feloniously removes goods from it, this is larceny.[4] But a mere intent to steal does not constitute larceny in the servant; who becomes guilty only when, with the felonious intent, he does something with the goods contrary to his duty.[5]

Any bare Custody. — And, generally, where one has the bare charge or care of effects which belong to another, whether his relation to the owner be that of a servant or not, "the legal possession," observes Mr. East, "remains in the owner; and the party may be guilty of trespass and larceny in fraudulently converting the same to his own use." [6]

§ 825. **Taking Note to indorse, and refusing return.** — Therefore the maker of a promissory note, who, on paying it in part, took

[1] Rex *v.* Walsh, Russ. & Ry. 215, 2 Leach, 4th ed. 1054, 4 Taunt. 258.

[2] Commonwealth *v.* King, 9 Cush. 284, 288, opinion by Dewey, J.

[3] Reg. *v.* Samways, Dears. 371, 26 Eng. L. & Eq. 576; Reg. *v.* Robins, Dears. 418, 18 Jur. 1058, 29 Eng. L. & Eq. 544; Reg. *v.* Heath, 2 Moody, 33; Walker *v.* Commonwealth, 8 Leigh, 743; Rex *v.* Butteris, 6 Car. & P. 147; Reg. *v.* Manning, Dears. 21, 17 Jur. 28, 14 Eng. L. & Eq. 548; Rex *v.* Hammon, 4 Taunt. 304, 2 Leach, 4th ed. 1083; Rex *v.* Bass, 1 Leach, 4th ed. 251, 2 East P. C. 566, 598; Rex *v.* Robinson, 2 East P. C. 565; Gill *v.* Bright, 6 T. B. Monr. 130; Rex *v.* McNamee, 1 Moody, 368; Reg. *v.* Jackson, 2 Moody, 32; Commonwealth *v.* Brown, 4 Mass. 580; People *v.* Wood, 2 Parker C. C. 22; People *v.* Belden, 37 Cal. 51.

[4] Marcus *v.* The State, 26 Ind. 101; Commonwealth *v.* Davis, 104 Mass. 548.

[5] Reg. *v.* Roberts, 3 Cox C. C. 74. And see Reg. *v.* Low, 10 Cox C. C. 168; Reg. *v.* Warren, 10 Cox C. C. 359; Reg. *v.* Richardson, 1 Fost. & F. 488; post, § 830 et seq.

[6] 2 East P. C. 564; People *v.* Call, 1 Denio, 120.

it into his hands to indorse the payment, was deemed to have only the custody, while the possession remained in the holder; and, when afterward he refused to give it back, and converted it to his own use, the court held this to be larceny.[1]

§ 826. **Custody and Possession further distinguished.** — There are some nice distinctions between custody and possession. In pleading, which belongs to "Criminal Procedure" and not to these volumes, we have the doctrine that, as a man may do by an agent whatever he may by his personal volition,[2] he can have a possession by another, as well as by himself.[3] And though this other has a special property in the thing, carrying with it the possession, or such other care as will prevent his misappropriation of it from being theft, still an indictment for larceny against a third person may well enough lay the property in the general owner, even under circumstances in which it may just as well lay it in the bailee.[4]

§ 827. **Continued.** — But the question here is, under what circumstances the person having authority over a thing is so in *possession* of it that to misappropriate it will not be larceny; and in what other circumstances he has only the *custody* by reason of which his misappropriation of it will be larceny. And when that is ascertained, a further difficulty remains, namely, supposing the larceny possible, what act, superadded to the intent to steal, will amount to the asportation by trespass.[5] It is not practically convenient to separate these two branches of the inquiry, therefore we shall look at them together.

§ 828. **Continued.** — Among the classes of cases within this inquiry, we have those which involve the doctrine of —

Ultimate destination. — We saw something of this under the title "Embezzlement."[6] If a first person receives for a second, goods from a third, plainly he does not commit larceny as against the third, when he misappropriates them; because, on a principle already explained,[7] the third person had parted, by the delivery

[1] People *v.* Call, 1 Denio, 120. In substance like this, is Dignowitty *v.* The State, 17 Texas, 521. But see The State *v.* Deal, 64 N. C. 270. Compare this doctrine with some of the cases stated ante, § 797.

[2] See Broom Leg. Max. 2d ed. 643.

[3] Rex *v.* Longstreeth, 1 Moody, 137; Rex *v.* Clarke, 2 Leach, 4th ed. 1036; s. c. nom. Rex *v.* Clark, Russ. & Ry. 181; Reg. *v.* Ashley, 1 Car. & K. 198; Commonwealth *v.* Morse, 14 Mass. 217.

[4] Ante, § 789; Langford *v.* The State, 8 Texas, 115. And see The State *v.* Somerville, 21 Maine, 14.

[5] Ante, § 799.

[6] Ante, § 368.

[7] Ante, § 811–813.

to the first, with his property in the goods.[1] Plainly also he does not commit larceny against the second person, now really the owner, until the goods have come so far into the latter's hands as to be deemed, in law, to be in his possession; because, without a possession in the second person, the first cannot commit a trespass on them as against him. Therefore the doctrine is, that, when one has received from a third person goods for a second, he can become guilty of larceny of them only after they have reached their *ultimate destination*.[2]

§ 829. **Continued.** — What, within this rule, is an "ultimate destination"?

Person of Servant. — When a thing, which was never in the master's possession, is passing to him through the servant's hands, the person of the servant is not — at least, not ordinarily — its ultimate destination. Therefore, while the thing remains on the servant's person, the latter does not, as against his master, commit a trespass in transporting it about; and, though he has the intent to steal, the transaction is not larceny.[3]

§ 830. **Servant's own Hiding-place.** — If, in addition to this, the servant takes the thing and deposits it in a hiding-place of his own, he does not commit the trespass essential in larceny. Thus, in an old and familiar case, where one, authorized to sell some effects, sold them and concealed the money in his master's house; after which, as a separate transaction, he took this money, intending to appropriate it to his own use; he was held not to be guilty of larceny.[4]

Distinction — (When Larceny — When not). — The distinction is, that, if the clerk or servant puts the coins or bank-notes received from a customer into the cash or bill drawer, and afterward with felonious intent takes them out,[5] he commits larceny; but, if he puts them in the first instance into his own pocket, or if he car-

[1] In Rex *v.* Hawtin, 7 Car. & P. 281, this was so intimated by Alderson, B., in a case of money paid to one not authorized in fact to receive it, though the party paying it supposed he was authorized.

[2] Reg. *v.* Reed, 24 Eng. L. & Eq. 562, Dears. 257, 18 Jur. 66; Rex *v.* Hawtin, supra; 2 East P. C. 568; Rex *v.* Hart, 6 Car. & P. 106; Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14, 14 Jur. 870.

[3] Reg. *v.* Reed, 24 Eng. L. & Eq. 562, 18 Jur. 66, Dears. 257.

[4] Rex *v.* Dingley, cited 1 Show. 53, Gouldsb. 186, 2 Leach, 4th ed. 840; ante, § 823.

[5] Rex *v.* Hammon, Russ. & Ry. 221, 2 Leach, 4th ed. 1083, 4 Taunt. 304; Rex *v.* Chipchase, 2 Leach, 4th ed. 699, 2 East P. C. 567; Rex *v.* Murray, 1 Leach, 4th ed, 344, 2 East P. C. 683; Commonwealth *v.* Barry, 116 Mass. 1.

ries them directly elsewhere and conceals them, taking them on a subsequent occasion, he does not commit the offence, however felonious his intent.[1]

Person of Servant, again. — And it seems to have been further held, in a case which goes to the verge, that, if there is no place of deposit for the thing aside from the personal custody of the servant, who is to keep it for his master, and it is delivered at the place where his duty requires him to receive and keep it, he may then be guilty of larceny by converting it wrongfully; though it is not shown to have been put in any place separate from his person.[2]

§ 831. **Coals in Master's Cart.** — Where a servant was sent for some coals the master was purchasing, with direction to bring them home in the cart of the latter, this cart was held to be, within our present distinction, a place of ultimate destination; the reason being, that, since the cart was, in law, in the master's possession,[3] the coals therein must be deemed so also. And where the servant, on his way home, disposed of a part of the coals for his own benefit, he was held to have committed larceny of them.[4] Again, —

Straw at Stable-door. — A servant who brought some straw home for his master, was held to have delivered it at a place of ultimate destination when he laid it down at the stable-door, before taking it within; so that, by carrying a portion of it away from this spot, with felonious intent, he became guilty of this offence.[5]

§ 832. **Limitation of Doctrine — (Prior Ownership of Master).** — The doctrine of the last three sections does not apply where the master had the ownership of the specific thing, and consequently the legal possession of it, before its delivery to the servant; for, in such a case, this change of custody does not change the possession in law.[6] Therefore —

[1] Rex *v.* Bazeley, 2 Leach, 4th ed. 835; s. c. nom. Bazely's Case, 2 East P. C. 571; Rex *v.* Waite, 1 Leach, 4th ed. 28, 2 East P. C. 570. And see Reg. *v.* Green, 24 Eng. L. & Eq. 555, 18 Jur. 158, Dears. 323; Rex *v.* Headge, 2 Leach, 4th ed. 1033, Russ. & Ry. 160; Rex *v.* Walsh, Russ. & Ry. 215, 4 Taunt. 258, 2 Leach, 4th ed. 1054.

[2] Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14, 14 Jur. 870. And see observations in Reg. *v.* Reed, 24 Eng. L. & Eq. 562.

[3] Rex *v.* Robinson, 2 East P. C. 565.

[4] Reg. *v.* Reed, 24 Eng. L. & Eq. 562, 18 Jur. 66, Dears. 257. See also Rex *v.* Harding, Russ. & Ry. 125; Reg. *v* Bunkall, Leigh & C. 371.

[5] Reg. *v* Hayward, 1 Car. & K. 518.

[6] 1st Rep. Eng. Crim. Law Com. A. D.

Servant sent for Goods purchased. — If a corn-factor purchases the cargo of a vessel laden with corn, — a case in which the purchase transfers the ownership before formal delivery to the buyer, — and sends his servant with a lighter to the ship for it, then, if the servant takes some of it directly from the ship before it is transferred to the lighter, he commits a larceny.[1]

Servant taking from Servant. — And possibly, under some circumstances, if a servant receives from a third person a thing for the master, not the master's before; in a case where the receipt is, as to other persons, a receipt in law by the master;[2] a second servant, taking the thing by delivery from the first, may commit larceny of it as against the master, into whose possession this second servant cannot deny that the thing has come.[3]

§ 833. **Bailees and others having Special Property.** — Common carriers and other bailees, and persons in the like relations, who have a special property in goods in their hands, and persons generally to whom goods are committed under contract, cannot become guilty of larceny of them while the relation subsists; their entire control and *quasi* ownership being inconsistent with the idea of a trespass. Such persons are said to have a possession of the goods, in distinction from a custody.[4]

§ 834. **Continued — (Relation ended — Breaking Bulk).** — But where the relation has ended, — as, for instance, where the goods conveyed by a carrier have fully reached their place of destination,[5] or he has broken open a package in violation of his trust,[6] — there may then be a larceny. This distinction has led to the apparently absurd proposition, that no offence is committed by a carrier stealing the entire parcel which he is carrying, but it is

1834, p. 21, pl. 4; Reg. *v.* Watts, 1 Eng. L. & Eq. 558, 2 Den. C. C. 14. And see ante, § 823.

[1] Rex *v.* Abrahat, 2 Leach, 4th ed. 824, 2 East P. C. 569.

[2] See Reg. *v.* Reed, 24 Eng. L. & Eq. 562, 18 Jur. 66.

[3] Reg. *v.* Watts, 2 Den. C. C. 14, 1 Eng. L. & Eq. 558, 14 Jur. 870.

[4] Wright *v.* Lindsay, 20 Ala. 428; Anonymous, J. Kel. 81, 82, 83; Rex *v.* Fletcher, 4 Car. & P. 545; Rex *v.* Pratley, 5 Car. & P. 533; Rex *v.* Savage, 5 Car. & P. 143; Rex *v.* Smith, 1 Moody, 473; Reg. *v.* Thristle, 1 Den. C. C. 502, 2 Car. & K. 842, 3 New Sess. Cas. 702, 18 Jur. 1035; Rex *v.* Banks, Russ. & Ry. 441; Commonwealth *v.* James, 1 Pick. 375.

[5] Anonymous, J. Kel. 83; 2 East P. C. 696. And see Rex *v.* Charlewood, 1 Leach, 4th ed. 409, 2 East P. C. 689; post, § 861.

[6] Rex *v.* Madox, Russ. & Ry. 92; Rex *v.* Brazier, Russ. & Ry. 337; Robinson *v.* The State, 1 Coldw. 120. And see Commonwealth *v.* James, 1 Pick. 375; Reg. *v.* Poyser, 4 Eng. L. & Eq. 565, 2 Den C. C. 233; post, § 860.

larceny to steal a part.[1] If the bailment was gratuitous, it is still the same as though for hire.[2]

§ 835. **Distinctions reduced to another Form.** — The foregoing distinctions, being in all the books, could not properly be omitted. Yet they are not practically so helpful to the practitioner and the judge as they seem to be. In looking into each case, what we are to find, to make larceny of it, is a trespass; this is the point to which the other inquiries tend, as to a common centre. And the simpler propositions are the following: A servant may steal his master's goods; a bailee or any other person may steal the property intrusted to him; but, to do so, he must commit a trespass.[3] And a trespass requires for its commission an act differing with the circumstances of the particular case, and with the relations of the parties to the property. It consists in doing, by way of physical or manual force, as already explained,[4] something to the physical substance taken, of a nature or to an extent not lawfully done under the charge or bailment. If the thing done is such as would be no violation of duty, were the doer's intent not felonious; or, being a violation, would not be a technical trespass; the transaction is not larceny, though the intent be felonious. And the felonious intent and act of technical trespass must, in these as in other circumstances,[5] concur in point of time. Yet these plainer propositions cannot be followed safely without some reference to the adjudications. For the law on this subject is so nicely technical, that we can hardly affirm it to rest on any proposition, or series of propositions; or, indeed, on any thing. Let us see something further of the cases.

§ 836. **Servant doing what Duty forbids.** — If a servant, having an article in his custody, and intending to steal it, does, for the purpose of theft, any thing with the article forbidden by his duty, he commits larceny.[6] Thus, —

Absconding with Master's Cart. — "A carter going away with his master's cart was holden a felony."[7] For, being impelled by his master's mind rather than his own when in the line of duty, he

[1] Anonymous, J. Kel. 81, 82, 83, 2 East P. C. 696; Rex *v.* Howell, 7 Car. & P. 325; Commonwealth *v.* Brown, 4 Mass. 580. See, concerning these several classes of persons, post, § 858-871.

[2] The State *v.* Fairclough, 29 Conn. 47

[3] Ante, § 799.

[4] Ante, § 804, 805.

[5] Ante, § 801.

[6] Powell *v.* The State, 34 Ark. 693.

[7] Rex *v.* Robinson, 2 East P. C. 565.

commits a trespass by departing of his own will out of that line.[1]

Selling Master's Goods. — So, if a servant has goods delivered him to convey to a customer, but sells them for his own benefit, — that is, carries them, with felonious intent, where his duty forbids, — he commits the trespass necessary in a larceny of the goods.[2]

Bailee doing what Duty forbids. — But what would be larceny in a servant is not necessarily so in a bailee. Thus, —

Carrying to Wrong Place — Selling. — A common carrier taking a parcel out of the way, or selling it, does not commit the tres-

[1] **Clerk taking Money.** — Exactly the same occurs where a clerk takes money out of his employer's till, and puts it into his own pocket, Rex *v.* Hammon, Russ. & Ry. 221, 2 Leach, 4th ed. 1083, 4 Taunt. 304; or (**Goods.** —) removes goods of his employer, intending to steal them, Reg. *v.* Manning, Dears. 21, 17 Jur. 28, 14 Eng. L. & Eq. 548, 22 Law J. N. S. M. C. 21; Walker *v.* Commonwealth, 8 Leigh, 743; Reg. *v.* Robins, Dears. 418, 18 Jur. 1058, 29 Eng. L. & Eq. 544; Reg. *v.* Samways, 26 Eng. L. & Eq. 576. These acts are larceny. **Bill of Exchange.** — So it is larceny for the confidential clerk of a merchant to take a bill of exchange, unindorsed, from the bill-box, and convert it to his own use, although he was in the habit of attending to the cash affairs from week to week; for, as it had not been delivered him by his employer for this purpose, the taking is tortious, from the employer's possession. Rex *v.* Chipchase, 2 Leach, 4th ed. 699, 2 East P. C. 567; and see ante, § 829, 830.

[2] Rex *v.* Bass, 1 Leach, 4th ed. 251, 2 East P. C. 566, 598; Rex *v.* McNamee, 1 Moody, 368; Reg. *v.* Jackson, 2 Moody, 32; Rex *v.* Butteris, 6 Car. & P. 147; Rex *v.* Stock, 1 Moody, 87; United States *v.* Clew, 4 Wash. C. C. 700; Rex *v.* Jones, 7 Car. & P. 151; Reg. *v.* Jenkins, 9 Car. & P. 38; Reg. *v.* Harvey, 9 Car. & P. 353. In the following cases, overruling the doctrine of Rex *v.* Watson, 2 East P. C. 562, the act was held to be larceny, the felonious intent being shown: **Bill to send by Mail.** — One employed as clerk, in the daytime, but not residing in the house, converted to his own use a bill of exchange, which, in the usual course of business, he received from his employer, with directions to transmit it by post to a correspondent; Rex *v.* Paradice, 2 East P. C. 565. **Check for Creditor.** — Other clerks, receiving checks to deliver to creditors, appropriated to themselves the whole; Rex *v.* Metcalf, 1 Moody, 433; Reg. *v.* Heath, 2 Moody, 33. **Money.** — Others, receiving money; Rex *v.* Lavender, 2 East P. C. 566. A servant, being sent with 6*s.* to buy twelve cwt. of coals, bought a smaller quantity for 3*s.* 3*d.*, and appropriated one of the shillings to his own use; Reg. *v.* Beaman, Car. & M. 595. Another person, sent with another sum of money, misappropriated the whole; Reg. *v.* Smith, 1 Car. & K. 423. **Articles to sell.** — A servant, intrusted with some articles of clothing to sell, and money to make change, left the country with the money and clothing; Reg. *v.* Hawkins, 1 Den. C. C. 584, Temp. & M. 328, 14 Jur. 513, 1 Eng. L. & Eq. 547. **Barge.** — One employed to take a barge to a certain place, being paid his wages in advance, and a separate sum of three sovereigns to pay tonnage, took the barge part way, paid a part of the sum for tonnage, and converted the rest of the money to his own use; Reg. *v.* Goode, Car. & M. 582. And see Reg. *v.* Goodenough, Dears. 210, 25 Eng. L. & Eq. 572. See, however, Reg. *v.* Evans, Car. & M. 632.

pass essential in larceny;[1] because, in the relation which he sustains, his own mind is to control his actions, — not the mind of the owner, to whom his responsibilities are very different from those of a servant. And where the prisoner, being specially employed to drive six pigs to a certain place, left one of them on the way with Mr. M., because it was tired; of which act he informed the owner, and was then directed to ask Mr. M. to keep it; but, instead of asking him, went and sold it to him; this selling was ruled, in a jury case, not to be larceny.[2] Obviously the sale involved no physical act done to that physical thing, the pig; which physical thing, being already in the purchaser's hands, required no manual delivery to convey the title.

§ 837. **Persons having Goods not intrusted.** — There is another class of cases; it differs both from those of bailees, and of servants general and special; in which the thing came lawfully and properly into the hands of the person, to whom, nevertheless, it was not intrusted. The doctrine concerning this class is, that, if in the original taking there was neither any evil intent nor a technical trespass, no larceny is committed by any subsequent misappropriation, with felonious intent. Consequently, —

Taken into Possession at Fire. — Where a woman, at a fire, joined her neighbors in removing goods, under the observation of the owner, but not at his request; and she secreted the goods she removed, and denied having them; but the jury found that her first intention was right, and the theft was an afterthought; she was held not to be guilty of larceny; "for, if the original taking were not with intent to steal, the subsequent conversion was no felony, but a breach of trust."[3]

§ 838. **Lost Goods.** — If goods have been lost, and a person not knowing the owner has taken them into possession lawfully, the principle just stated shows that he cannot afterward, having ascertained who the owner is, commit larceny of them. Even, according to the current of opinion, which is a little disturbed by contrary intimations, the familiar rule concerning common carriers that the offence may be perpetrated by breaking bulk,[4] does not apply to lost goods. For, said Parke, B., "it seems difficult to

[1] Ante, § 833, 834.
[2] Reg. v. Jones, Car. & M. 611.
[3] Rex v. Leigh, 2 East P. C. 694, 1 Leach, 4th ed. 411, note.
[4] Ante, § 834.

apply that doctrine, which belongs to bailment where a special property is acquired by contract, to any case of goods merely lost and found, where a special property is acquired by finding."[1] This doctrine of lost goods, with that of bailments, of larcenies by servants, and some others, will be further considered under another sub-title.

§ 839. **Trespass in Original Taking.** — If, in the original taking of an article, there was a trespass, even though it was but a technical civil one, and *a fortiori* if the taking was felonious, any subsequent asportation of the article is a renewal of the trespass; and, when done with intent to steal it, is larceny.[2] Therefore, —

Driving Sheep. — Where a defendant, in driving away a flock of his own lambs from a field, inadvertently drove with them a lamb belonging to another person; and, as soon as he had discovered his mistake, sold the lamb for his own, and denied all knowledge of the fact; he was held to have committed larceny of the sheep.[3] Again, —

Carrying to another County. — It is familiar doctrine, belonging, however, to the department of the Procedure, that, when a thief steals goods which he carries away, he becomes guilty of a complete larceny in every county or distinct locality into which he takes them, while his intent to steal continues.[4]

VI. *The Intent.*

§ 840. **What is meant by "The Intent."** — We saw, in the preceding volume,[5] that larceny requires a concurrence, with the act, of two intents; namely, a general one to do the trespass, and a

[1] Reg. *v.* Thurborn, 1 Den. C. C. 387, 395, 2 Car. & K. 831, Temp. & M. 67; s. c. nom. Reg. *v.* Tharbone, 13 Jur. 499; s. c. Reg. *v.* Wood, 3 New Sess. Cas. 581. See also s. p. Lane *v.* People, 5 Gilman, 305; Ransom *v.* The State, 22 Conn. 153; The State *v.* Conway, 18 Misso. 321; The State *v.* Roper, 3 Dev. 473; People *v.* Cogdell, 1 Hill, N. Y. 94; People *v.* Anderson, 14 Johns. 294; Reg. *v.* Preston, 2 Den. C. C. 353, 8 Eng. L. & Eq. 589; Porter *v.* The State, Mart. & Yerg. 226. But see, as perhaps having a contrary bearing, Rex *v.* Wynne, 1 Leach, 4th ed. 413, 2 East P. C. 664, 697; Rex *v.* Sears, 1 Leach, 4th ed. 415, note; The State *v.* Ferguson, 2 McMullan, 502; Cartwright *v.* Green, 2 Leach, 4th ed. 952, 8 Ves. 405. See further, concerning lost goods, post, § 878–883.

[2] Commonwealth *v.* White, 11 Cush. 483; Reg. *v.* Riley, 14 Eng. L. & Eq. 544, Dears. 149, 17 Jur. 189, 22 Law J. N. S. M. C. 48. But see Rex *v.* Holloway, 5 Car. & P. 524.

[3] Reg. *v.* Riley, supra.

[4] Crim. Proced. I. § 59, 60; II. § 727. As to stealing goods in another State or country and bringing them into our own, see Vol. I. § 137–142; The State *v.* Newman, 9 Nev. 48.

[5] Vol. I. § 342.

particular one. Commonly, however, when speaking of the intent in larceny, we mean the particular intent; and so shall we through the following sections.

Must be "Felonious." — This particular intent is called "felonious." Without it there can be no larceny.[1] "What is meant by felonious intent," said Reade, J., in a North Carolina case, "is a question for the court; and, after the court defines that, then it is for the jury to say whether [the defendant] had such intent."[2]

Difficult — Conflicting. — But the law on this question of intent is difficult, and the authorities are in a measure conflicting. Still there are, relating to it, some leading doctrines which are reasonably certain.

More than mere Trespass. — None of the authorities doubt, that the taking, to be felonious, must be by more than a mere careless trespass;[3] as, "if the sheep of A strays from the flock of A into the flock of B, and B drives it along with his flock, or by pure mistake shears it, this is not a felony; but, if he knows it to be another's, and marks it with his mark, this is an evidence of a felony."[4] Again, —

§ 841. **Deprive of entire Ownership.** — In general doctrine, the intent must be to deprive the owner of his entire ownership, in distinction from a temporary use of the property.[5] Thus, —

Taking a Thing to use and return it. — If one takes a horse, however wrongfully, merely to use and return it;[6] as, if an indentured servant, to escape from service, rides away his master's horse, not intending to deprive him of his ownership in it;[7] or,

[1] Blunt *v.* Commonwealth, 4 Leigh, 689; Witt *v.* The State, 9 Misso. 663; Rex *v.* Holloway, 5 Car. & P. 524; Reg. *v.* Godfrey, 8 Car. & P. 563; Smith *v.* Shultz, 1 Scam. 490; Rex *v.* Hall, 3 Car. & P. 409; The State *v.* Hawkins, 8 Port. 461; The State *v.* Gresser, 19 Misso. 247; Williams *v.* The State, 44 Ala. 396; Reg. *v.* Deering, 11 Cox C. C. 298; The State *v.* Matthews, 20 Misso. 55; The State *v.* Fritchler, 54 Misso. 424; Phelps *v.* People, 55 Ill. 334; Wood *v.* The State, 34 Ark. 341

[2] The State *v.* Gaither, 72 N. C. 458, 460.

[3] McCourt *v.* People, 64 N. Y. 583; Mason *v.* The State, 32 Ark. 238; Umphrey *v.* The State, 63 Ind. 223; People *v.* Walker, 38 Mich. 156; Devine *v.* People, 20 Hun, 98.

[4] 1 Hale P. C. 507.

[5] Vol. I. § 566, 579; 1 Hale P. C. 509; Reg. *v.* Trebilcock, Dears. & B. 453, 7 Cox C. C. 408; Fields *v.* The State, 6 Coldw. 524; Reg. *v.* Guernsey, 1 Fost. & F. 394; The State *v.* Shermer, 55 Misso. 83; Reg. *v.* Holloway, and the other cases below cited; Rex *v.* Van Muyen, Russ. & Ry. 118; Reg. *v.* Yorke, 2 Car. & K. 841; s. c. nom. Reg. *v.* York, 1 Den. C. C. 335, Temp. & M. 20; The State *v.* South, 4 Dutcher, 28; Keely *v.* The State, 14 Ind. 36.

[6] The State *v.* Self, 1 Bay, 242.

[7] The State *v.* York, 5 Harring. Del. 493.

if the wrong-doer leads the animal from a stable which he enters at night, and rides it many miles to a tavern and leaves it, his purpose being simply to do this, without any intent to return it;[1] such person does not commit larceny. In like manner, if a thief takes a horse only to help himself off with other property stolen, he does not steal the horse.[2]

To get Pay for Work not done. — And where an employee in a tannery removed some dressed skins from the warehouse to another part of the premises, for the purpose of delivering them to the foreman and getting paid for them as his own work, this was held not to be larceny.[3]

To sell to Owner. — It would have been otherwise if the intent had been to sell the skins to the owner;[4] for then there would have been an intended appropriation of the entire property, instead of the interest in it which consists in having done labor thereon.

To entice to Fornication. — A man does not commit larceny of articles from a girl, when he takes them merely to make her come for them, to afford him the opportunity of enticing her into an act of fornication.[5]

To pledge, then redeem and return. — If one takes another's goods intending to pledge them, then redeem and return them, this, within the foregoing views, would at the first impression seem in strictness not to be larceny. And so it has been, by some judges, held.[6] But plainly this limitation of the intent must be shown by the defendant, to avail him; for the outward facts *prima facie* constitute a larceny. And Gurney, B., once said to a jury: "I confess I think, that, if this doctrine of an intention to redeem property is to prevail, courts of justice will be of very little use. A more glorious doctrine for thieves it would

[1] Rex *v.* Philipps, 2 East P. C. 662.

[2] Rex *v.* Crump, 1 Car. & P. 658; Rex *v.* McMakin, Russ. & Ry. 333, note.

[3] Reg. *v.* Holloway, 1 Den. C. C. 370, 2 Car. & K. 942, Temp. & M. 40, 3 New Sess. Cas. 410, 13 Jur. 86. This case is hardly distinguishable, on principle, from Reg. *v.* Richards, 1 Car. & K. 532, in which Tindal, C. J., ruled the other way.

[4] Reg. *v.* Hall, Temp. & M. 47, 1 Den. C. C. 381, 2 Car. & K. 947, 3 New Sess. Cas. 407, 13 Jur. 87, where the servant of a tallow chandler clandestinely removed, from an upper to a lower room in his master's warehouse, a quantity of fat, and placed it in the scales, representing afterward that a butcher had brought it for sale, — this was held to be larceny.

[5] Rex *v.* Dickinson, Russ. & Ry. 420.

[6] Rex *v.* Wright, Car. Crim. Law, 3d ed. 278, by Hullock, B., and Holroyd, J., stated also 9 Car. & P. 554, note.

be difficult to discover, but a more injurious doctrine for honest men cannot well be imagined."[1] Now, if a man pledges an article, he transmits an ownership, which, though not perfect, will become so if he fails to perform the condition to the pledgee; and this is very different from his merely holding it in his own temporary custody and using it. Perhaps, therefore, in principle, the taking with intent to pledge is larceny, even though there is the further intent to redeem and return the thing pledged. So, at least, either from principle or from considerations of policy, such a transaction would now appear to be generally regarded.[2]

§ 841 *a*. **Part of the Thing.** — The doctrine seems to be, both in principle and authority, that, if the intent is, not to deprive the owner of the whole thing, but of a part of it, or a part interest in it, the transaction will be larceny. Thus, —

Taking to compel Reward. — The Massachusetts court has held, that, if one takes a horse found astray on his land, to conceal it until the owner offers a reward for its return and then claim the reward, or to induce the owner to sell it astray for less than its value, this is larceny. And Morton, J., said: "When a person takes property of another with the intent to deprive the owner of a portion of the property taken or of its value, such intent s felonious and the taking is larceny."[3] Again, —

Railway Ticket. — It is larceny fraudulently to take a railway ticket, meaning to use it in travel, though the ticket is to be returned at the end of the journey.[4]

§ 842. **Lucri causa — (Animo Furandi).** — Besides the foregoing doctrines, it is frequently laid down in the books, that the taking must also be *lucri causa*. That it must be *animo furandi* is a common expression, which really means nothing; for what is an intent to steal? Blackstone observes: "The taking and carrying away must be *felonious*; that is, done *animo furandi*; or, as the civil law expresses it, *lucri causa*. This requisite, besides excusing those who labor under incapacities of mind or will, indemnifies also mere trespassers, and other petty offenders. As if a servant takes his master's horse without his knowledge, and

[1] Reg. *v.* Phethean, 9 Car. & P. 552, 553.

[2] Reg. *v.* Trebilcock, Dears. & B. 453, 7 Cox C. C. 408; Fields *v.* The State, 6 Coldw. 524.

[3] Commonwealth *v.* Mason, 105 Mass. 163, 167. The like has been held by the Court of Criminal Appeal in Ireland, Reg. *v.* O'Donnell, 7 Cox C. C. 337.

[4] Reg. *v.* Beecham, 5 Cox C. C. 181

brings him home again; if a neighbor takes another's plough that is left in the field, and uses it upon his own land and then returns it; if under color of arrear of rent, where none is due, I distrain another's cattle or seize them; all these are misdemeanors and trespasses, but no felonies. The ordinary discovery of a felonious intent is where the party doth it clandestinely;[1] or, being charged with the fact, denies it. But this is by no means the only criterion of criminality; for in cases that may amount to larceny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to recount all those, which may evidence a felonious intent, or *animum furandi;* wherefore they must be left to the due and attentive consideration of the court and jury."[2] Now these words of the commentator seem even ludicrously indefinite; yet really they convey about as exact an idea as can be stated, with any assurance of its being correct, applied in all the localities in which the common law is administered.[3] And we find much difficulty, not only in saying how far the decisions of the different States conflict with one another, but how far also the later decisions overturn the earlier.

§ 843. **Convert to own Use? — Advantage to Self? — Deprive Owner?** — There are authorities which seem even to maintain, that the thief must intend to convert the property to his own use.[4] But the true view, where the necessity of the *lucri causa* is conceded, is simply that he should intend some advantage to himself, in distinction from a mere act of mischief to another.[5] Thus, —

[1] **Secrecy of The Taking.** — In North Carolina a doctrine seems to prevail, in rather indistinct outline, to the effect that, for a taking to be larceny, it must be in some sense clandestine. The State *v.* Ledford, 67 N. C. 60; The State *v.* Deal, 64 N. C. 270. Now, in matter of evidence, secrecy in the taking, or an attempt to conceal the thing taken, may, according to general doctrine, be important. Long *v.* The State, 11 Fla. 295; Gardiner *v.* The State, 33 Texas, 692; McDaniel *v.* The State, 33 Texas, 419. But, in matter of law, the taking need not be secret, neither need the thing taken be concealed. The State *v.* Fenn, 41 Conn. 590. And see ante, § 796, 804, 816, 819, 820, 825, and various other places.

[2] 4 Bl. Com. 232. And see ante, § 841 and cases there cited.

[3] See ante, § 758 and note, and cases there cited.

[4] McDaniel *v.* The State, 8 Sm. & M. 401, 418; The State *v.* Hawkins, 8 Port. 461. But an intent to convert the property to his own use generally, is sufficient, though no intent is shown to do so in the county in which it is taken. The State *v.* Ware, 10 Ala. 814.

[5] Vol. I. § 566; ante, § 758. The Alabama court held, during slavery, that, in the absence of any statutory provision,

Taking to give away. — If the intent is to make a gift of the article to a friend, the offence is committed;[1] but here the view may be, that the thief first appropriated the thing to himself, then gave it away.

To feed to Owner's Horses. — And where a servant clandestinely takes grain belonging to his master to feed to the master's horses, he commits larceny of the grain, — a proposition settled in England, though upon it there were formerly doubts.[2]

To avoid Penalty. — Likewise, if a post-office clerk secretes a letter to avoid the penalty attached to a mistake he has made concerning it, he commits a larceny of the letter.[3]

To suppress Inquiry. — So does a servant-woman who intercepts and burns a letter to suppress inquiries it may suggest concerning her character.[4]

§ 844. **Idle Curiosity.** — On the other hand, Lord Abinger, C. B., in 1838, ruled, on a jury trial, that if, from idle curiosity, either personal or political, one opens a letter addressed to another, and keeps it, this is no larceny, though a part of his object is to prevent it from reaching its destination. "The term *lucri causa* infers," he said, "that it should be to gain some advantage to the party committing the offence. A malicious injury to the property of another is not enough."[5]

§ 845. **Tender of Value.** — We have intimations, that, if one taking an article tenders its value in money, he is, *prima facie*, not guilty of larceny. The offer of pay will not necessarily exempt him, but Mr. East says, it is "pregnant evidence."[6] This proceeds

it is not larceny to entice a slave from his master with the intent to secure to the slave his freedom; because, in such a case, the party intends no benefit to himself. The State *v.* Hawkins, 8 Port. 461. But the South Carolina tribunal characterized this as "a very novel and startling proposition;" for "the secret, fraudulent deprivation of the owner of his goods shows the felonious intent, as well without as with the *causa lucri*." The State *v.* Brown, 3 Strob. 508, 516. See post, § 847. And see People *v.* Juarez, 28 Cal. 380.

[1] Reg. *v.* White, 9 Car. & P. 344. And see Rex *v.* Curling, Russ. & Ry. 123.

[2] Rex *v.* Morfit, Russ. & Ry. 307; Reg. *v.* Privett, 1 Den. C. C. 193, 2 Car. & K. 114; Reg. *v.* Careswell, 5 Jur. 251; Reg. *v.* Usborne, 5 Jur. 200; Reg. *v.* Handley, Car. & M. 547; Reg. *v.* Gruncell, 9 Car. & P. 365. See Reg. *v.* Smith, 1 Cox C. C. 10.

[3] Reg. *v.* Wynn, 1 Den. C. C. 365, Temp. & M. 32, 2 Car. & K. 859, 3 New Sess. Cas. 414.

[4] Reg. *v.* Jones, 2 Car. & K. 236, 1 Den. C. C. 188.

[5] Reg. *v.* Godfrey, 8 Car. & P. 563.

[6] 2 East P. C. 662; 3 Greenl. Ev. § 157; Hammond on Larceny, parl. ed. p. 223, pl. 719–721.

from the supposed necessity of a *lucri causa*. Yet, in principle, if we admit such foundation to underlie the law of larceny, still there may be an advantage in compelling another to sell for its value property he does not wish to dispose of, sufficient to sustain the idea of lucre.

§ 846. **Lucri Causa discarded in England.** — The English courts, however, seem at last to have utterly overthrown the old notion of *lucri causa*. "Will it be contended," asked Pollock, C. B., "that picking a man's pocket, not to make yourself rich, but to make him poor, would not be a larceny?"[1] And thus, —

Backing Horse into Coal-pit. — As long ago as 1815, when the prisoner took a horse which he backed into a coal-pit and killed, to prevent it from furnishing evidence against one accused of stealing it, the majority of the English judges held his offence to be larceny.[2]

What Evil Intent — (Malicious Mischief — Stealing "Process" — Prevent Levy). — Undoubtedly this discarding of the *lucri causa* should not be construed to transmute malicious mischief into larceny. And, aside from the doctrine of malice, which pertains to malicious mischief, larceny still requires something more of evil in the intent than merely to deprive the owner of his goods by a wrongful act. Thus, Stat. 24 & 25 Vict. c. 96, § 30, having made it larceny to steal, among other things, any "process" issuing from a court, one was held not to have committed this offence, who, thinking, under a mistake of the law, to defeat a levy on his

[1] Reg. *v.* Jones, 1 Den. C. C. 188, 2 Car. & K. 236. And see Reg. *v.* Privett, 1 Den. C. C. 193, 2 Car. & K. 114; Rex *v.* Morfit, Russ. & Ry. 307.

[2] Rex *v.* Cabbage, Russ. & Ry. 292. "Six of the learned judges, namely, Richards, B., Bayley, J., Chambre, J., Thomson, C. B., Gibbs, C. J., and Lord Ellenborough, held it not essential to constitute the offence of larceny that the taking should be *lucri causa;* they thought a taking fraudulently, with an intent wholly to deprive the owner of the property, sufficient; but some of the six learned judges thought that, in this case, the object of protecting Howarth by the destruction of this animal might be deemed a benefit or *lucri causa*. Dallas, J., Wood, B., Graham, B., Le Blanc, J., and Heath, J., thought the conviction wrong." p. 293. **Proposed by the English Commissioners.** — The English Criminal Law Commissioners, in 1834, while regarding the matter as doubtful on the authorities, proposed that the legislature should enact as follows: "The ulterior motive by which the taker is influenced in despoiling the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial." 1st Rep. Eng. Crim. Law Com. A. D. 1834, p. 17, pl. 3. They observe: "Where the removal is merely nominal, and the motive is that of injury to the owner, and not of benefit to the taker, the offence is scarcely distinguishable from that of malicious mischief, which belongs to a 'different branch of criminal jurisprudence.'"

goods, forcibly took from the officer the warrants and kept them. "This," said Cockburn, C. J., "was not done *animo furandi;* it was not done *lucri causa.* It was no more stealing than it would be to take a stick out of a man's hand to beat him with it."[1] There is always a broad distinction between theft and a mere trespass.[2]

§ 847. **Lucri Causa with us.** — The American courts have not very much discussed this question of *lucri causa.* In a United States tribunal in California it was held, that, where one took away muskets to prevent their being used against himself and friends, he did not commit larceny; there being no *lucri causa,* which was assumed to be an essential ingredient in this offence.[3] But the Mississippi court held, during slavery, that taking a slave with the intent to convey him to a free State, and there make him free, is larceny of the slave; because, it was said, an intent to deprive the owner of his ownership in the property is sufficient, though there is no *lucri causa.* "The rule is now well settled," observed Handy, J., "that it is not necessary to constitute larceny that the taking should be in order to convert the thing stolen to the pecuniary advantage or gain of the taker; and that it is sufficient if the taking be fraudulent, and with an intent wholly to deprive the owner of the property."[4] And the Indiana court has laid down the doctrine, that the intent to defraud the owner, though without benefit to the thief, is a sufficient criminal intent in larceny.[5] So, in Texas, the taking of a thing with the intent to destroy it is deemed to be sufficient.[6]

§ 848. **How in Principle.** — The entire doctrine of larceny, in our law, is so technical as to render almost hopeless any attempt to settle a disputed point by an appeal to principle. Still, on the present question, if the *lucri causa* is required, this is placing the love of greed, as a base motive, pre-eminent over all other base motives. For it is immaterial to the person injured what species of base motive moved the wrong-doer. And the wrong to society

[1] Reg. *v.* Bailey, Law Rep. 1 C. C. 347, 349.

[2] Isaacs *v.* The State, 30 Texas, 450; ante, § 840.

[3] United States *v.* Durkee, 1 McAl. 196.

[4] Hamilton *v.* The State, 35 Missis. 214. And see ante, § 843, note.

[5] Keely *v.* The State, 14 Ind. 36. So in Alabama and New Jersey. Williams *v.* The State, 52 Ala. 411; The State *v.* Davis, 9 Vroom, 176.

[6] Dignowitty *v.* The State, 17 Texas, 521. And see Ridgeway *v.* The State, 41 Texas, 231; Mullins *v.* The State, 37 Texas, 337; The State *v.* Fenn, 41 Conn. 590.

is the same, whatever the nature of the baseness which prompted it. But, in reason, there are other evil motives as deserving of punishment as this which we term the love of greed. Surely a man who should secretly take from his rich neighbor some article of food to give to a famishing fellow-creature, having nothing of his own to bestow, is not, in the eye of a just morality, worse than he who should abstract the neighbor's bank-bills or negotiable bonds from their place of deposit, in order to impoverish the neighbor by committing them to the flames.

§ 849. **Taking to compel Payment of Debt.** — There is a Massachusetts case which holds, according to the reporter's head-note, that "taking money with intent to appropriate it to the payment of a debt due to the taker from the party from whom it is taken, is a sufficient evidence of a *conversion* to the taker's own use, to constitute larceny." And plainly here is a sufficient *conversion;* but under the title False Pretences [1] we saw, that, for a man to get possession of property of his debtor to compel payment of the debt, not to defraud him, does not constitute that crime, though a false pretence was the instrument by which the possession was secured. And, in larceny, if the object of the taker was to compel, though in an irregular way, the owner of the goods to do what the law required him to do with them, — namely, pay his debt, — there is no legal principle rendering the act a felony.[2] Looking now into this case, we see that the reporter's head-note was advisedly written in what seems to be an unscientific way, to meet the exact point decided on facts not well presented to the court. And in the trial of the cause before the lower tribunal, the following correct instruction had been given: "The defendant would not be guilty of larceny, if the jury were satisfied that she took this money under the honest belief that she had a legal right to take this specific money in the way and under the circumstances that she did take it, although in fact she may have had no such legal right." [3] On the whole, therefore, though this is not a very satisfactory case, we cannot pronounce it adverse to sound doctrine, or to the doctrine laid down under the title False Pretences.

§ 850. **Taking Food — Ignorance of Law — Drunkenness — Care-**

[1] Ante, § 466.

[2] So held in Reg. *v.* Hemmings, 4 Fost. & F. 50.

[3] Commonwealth *v.* Stebbins, 8 Gray, 492. And see Farrell *v.* People, 16 Ill 506; Butler *v.* The State, 3 Texas A 403; post, § 1162 *a*.

lessness. — The questions of taking food to preserve one's life,[1] ignorance of law,[2] drunkenness,[3] carelessness,[4] and the like, as affecting the intent, were discussed in the preceding volume.

§ 851. **Claim of Right.** — One who in good faith takes another's property under claim of title in himself is exempt from the charge of larceny, however puerile or mistaken such claim may be.[5] And it is the same where the taking is on behalf of another believed to be the owner.[6] But a mere dishonest pretence will not protect the taker.[7]

§ 852. **Usage.** — The Massachusetts court, while adhering to this doctrine, denied that, on an indictment for the larceny of portions of the cargo of a vessel, one not an officer could rely on a custom for officers of vessels to appropriate to themselves small parts of the cargoes, or instances in which they had done so under claim of right; because it would not be a legal custom; or, if it was, it applied only to officers.[8]

VII. *Larcenies of Particular Things and by Particular Classes of Persons.*

§ 853. **What for this Sub-title.** — In the preceding sub-titles, the principal rules and doctrines of the law of larceny are brought to view; and, in illustration of them, frequent mention is made of the classes of persons and particular things to be specially considered in this sub-title. We shall here, therefore, take a sort of

[1] Vol. I. § 349.

[2] Vol. I. § 297. **Lost Goods.** — An ignorant woman, indicted for the larceny of lost goods, was permitted to show in defence that she supposed the finding gave her a title to them. Reg. *v.* Reed, Car. & M. 306. And see Rex *v.* Hall, 3 Car. & P. 409.

[3] Vol. I. § 411.

[4] Vol. I. § 320.

[5] Vol. I. § 297; Neely *v.* The State, 8 Texas Ap. 64; Sisk *v.* The State, 9 Texas Ap. 246; Harrall *v.* The State, 4 Texas Ap. 427; Morningstar *v.* The State, 59 Ala. 30; Morningstar *v.* The State, 55 Ala. 148; Herber *v.* The State, 7 Texas, 69; Wirt *v.* The State, 9 Misso. 663; Merry *v.* Green, 7 M. & W. 623; The State *v.* Homes, 17 Misso. 379; The State *v.* Simons Dudley, Ga. 27; McDaniel *v.* The State, 8 Sm. & M. 401; Rex *v.* Hall, 3 Car. & P. 409; Reg. *v.* Halford, 11 Cox C. C. 88; Severance *v.* Carr, 43 N. H. 65; Kay *v.* The State, 40 Texas, 29; Smith *v.* The State, 42 Texas, 444; Varas *v.* The State, 41 Texas, 527; Johnson *v.* The State, 41 Texas, 608. See Vaughn *v.* Commonwealth, 10 Grat. 758; Randle *v.* The State, 49 Ala. 14.

[6] Rex *v.* Knight, 2 East P. C. 510; Herber *v.* The State, 7 Texas, 69; Baker *v.* The State, 17 Fla. 406; Miles *v.* The State, 1 Texas Ap. 510; The State *v.* Waltz, 52 Iowa, 227.

[7] Reg. *v.* Wade, 11 Cox C. C. 549.

[8] Commonwealth *v.* Doane, 1 Cush. 5. As to **Gleaning from Harvest Fields,** — by poor people, under a supposed right, see 2 Russ. Crimes, 3d Eng. ed. 10, 11; Roscoe Crim. Ev. 591.

retrospect of what has gone before, and add whatever of doctrine or authority may seem desirable.

§ 854. *Larcenies by Servants:* —

Mere Custodian. — A leading proposition is, that a servant is deemed to be, unlike a bailee, a mere custodian of a thing committed to his care by the master; instead of being, as a bailee is, in possession. Therefore —

May commit Larceny. — The servant may commit larceny of the thing, the same as any third person could do.[1] But, —

§ 855. **Trespass.** — Neither a servant nor any other person can be guilty of larceny unless he commits a trespass.[2] Therefore —

Previous Custody of Master — (Larceny and Embezzlement distinguished). — The goods, to be the subjects of larceny by the servant, must have been in the possession, actual or legal, of the master, before passing into the custody of the servant;[3] for, if they are delivered by a third person to the servant for the master, and, before they have reached their *ultimate destination*,[4] the servant converts them to his own use, his offence may be embezzlement,[5] but it is not larceny. The distinction is, that in the one instance the servant commits a trespass in the taking, in the other he does not.[6]

§ 856. **Illustrations of Larcenies by Servants.** — In previous discussions, we have seen many illustrations of larcenies by servants They assume almost numberless forms. Thus, —

Salesman taking Goods or Money. — One employed by a mercantile firm as a salesman in their store, having full control of the goods in the store-room, and of the money in the cash drawer, for the purposes of his employment, commits larceny when he feloniously abstracts the money or the goods.[7]

[1] Ante, § 824.

[2] Ante, § 799.

[3] Ante, § 828; Rex *v.* Bass, 1 Leach, 4th ed. 251, 2 East P. C. 566; Gill *v.* Bright, 6 T. B. Monr. 130; Reg. *v.* Hawkins, 1 Den. C. C. 584, Temp. & M. 328, 1 Eng. L. & Eq. 547; People *v.* Call, 1 Denio, 120; Reg. *v.* Button, 11 Q. B. 929; The State *v.* Self, 1 Bay, 242; Reg. *v.* Hall, Temp. & M. 47, 1 Den. C. C. 381, 3 New Sess. Cas. 407, 13 Jur. 87; Reg. *v.* Privett, 1 Den. C. C. 193.

[4] Ante, § 828–832.

[5] Ante, § 365–368.

[6] See, as illustrating this distinction, besides cases already referred to in this section and in previous connections, Reg. *v.* Essex, Dears. & B. 371, 7 Cox C. C. 385; Reg. *v.* Lyon, 1 Fost. & F. 54; Reg. *v.* Spears, 2 Leach, 4th ed. 825, 2 East P. C. 568; Reg. *v.* Betts, Bell C. C. 90, 8 Cox C. C. 140; Cobletz *v.* The State, 36 Texas, 353; Reg. *v.* Middleton, Law Rep. 2 C. C. 38, 12 Cox C. C. 260, 4 Eng. Rep. 536; Reg. *v.* Poynton, Leigh & C. 247, 9 Cox C. C. 249; Ennis *v.* The State, 3 Greene, Iowa, 67.

[7] Walker *v.* Commonwealth, 8 Leigh,

Clerk having Access in One Instance. — And a clerk, having no general access to a place wherein money is kept, if sent to it for a particular purpose, stands on the same ground with one who has a general access, or with one who has no access at all; if he steals any of it, he commits this offence.[1]

Selling without Authority. — Clearly one who has no power to sell, or has power to sell only in a particular way, incurs the like guilt when he sells contrary to his authority, and puts the money into his pocket.[2]

Stat. Hen. 8. — Some doubts, in early times, concerning the liability of servants to the law of larceny, led, as we have seen, to the enactment of 21 Hen. 8, c. 7. It is of little practical importance, and has been already explained.[3]

Later Statutes. — And in later times, both in England and our own country, not only statutes of embezzlement[4] have given a wider protection to property against peculations by servants than the common law furnished; but provisions also have been adopted against what are properly called larcenies by servants, differing more or less, or not at all, from the common law.[5]

§ 857. *Larcenies by Bailees:*[6] —

Bailment, what — (Bailor — Bailee). — A bailment is where one has personal property intrusted to him, to be returned, or delivered to another, in specie, when the object of the trust is accomplished.[7] The general owner of the property is called the bailor; the one to whom it is intrusted, the bailee. It is immaterial whether the property is to be returned in the form in which it was delivered, or in an altered state.[8] The test is, that the identical thing — not another thing of equal value — is to be returned.[9]

743. And see Rex *v.* Chipchase, 2 Leach, 4th ed. 699, 2 East P. C. 567.

[1] Rex *v.* Murray, 1 Leach, 4th ed. 344, 2 East P. C. 683.

[2] Reg. *v.* Wilson, 9 Car. & P. 27.

[3] Ante, § 319, 320.

[4] Ante, § 321–323, 327, 855; Stat. Crimes, § 418.

[5] Stat. Crimes, § 413–429; United States *v.* Driscoll, 1 Lowell, 303; United States *v.* Fisher, 5 McLean, 23; Rex *v.* Moore, 2 Leach, 4th ed. 575, 2 East P. C. 582; Snell *v.* The State, 50 Ga. 219.

[6] See Stat. Crimes, § 417, 419–425.

[7] Stat. Crimes, § 423; Moss *v.* Bettis, 4 Heisk. 661; Mallory *v.* Willis, 4 Comst. 76; Foster *v.* Pettibone, 3 Seld. 433; Reg. *v.* Aden, 12 Cox C. C. 512, 6 Eng. Rep. 337; Reg. *v.* Clegg, 11 Cox C. C. 212; Reg. *v.* Richmond, 12 Cox C. C. 495, 6 Eng. Rep. 332; Reg. *v.* Hassall, Leigh & C. 58, 8 Cox C. C. 491; Reg. *v.* Garrett, 8 Cox C. C. 368, 2 Fost. & F. 14; Whitney *v.* McConnell, 29 Mich. 12.

[8] Mallory *v.* Willis, supra; Foster *v.* Pettibone, supra. See Reg. *v.* Daynes, 12 Cox C. C. 514, 6 Eng. Rep. 339.

[9] Marsh *v.* Titus, 6 Thomp. & C. 29, 3 Hun, 550; Reg. *v.* Hunt, 8 Cox C. C 495.

Bailee deemed in Possession. — Bailees, unlike servants, are deemed to be in possession of the property intrusted to them; so that the doctrines applicable to servants do not apply to them.[1]

How commit Larceny. — Yet if a bailee receives goods, where only the possession, not the ownership, was agreed to pass, meaning at the same time to steal them, he becomes thereby guilty of larceny;[2] or if, after receiving them, he, contrary to his duty, breaks bulk or otherwise ends his relation of bailee to the bailor, and then, with felonious intent, appropriates the goods to himself, he commits larceny; but, if he receives them honestly, he cannot afterward become guilty of this offence in respect of them, while the relation subsists.[3] Among particular bailees are —

§ 858. **Common Carriers**[4] — (**Business — Single Instance — For Hire**). — If a man claims exemption as a common carrier, in distinction from the liabilities applicable to servants, he need not show that the carrying of goods is his business; but, if he is employed in this way for hire[5] in the single instance, it is sufficient.[6]

Carrier's Servant. — A carrier's servant, who drives the wagon, is subject to liability like other servants, and not exempt like his master.[7]

§ 859. **Drovers.** — Concerning drovers, we have the following: one employed to drive a heifer to a particular place for so much money, not being in the general service of the owner, was held to be a servant and not a bailee.[8] So was one employed only occasionally, as a general drover, and paid by the day;[9] yet the court afterward expressed a doubt whether this would be decided again the same way.[10] Under other circumstances the drover has

[1] Ante, § 824–827, 833.

[2] Ante, § 813; People *v.* Smith, 23 Cal 280.

[3] Ante, § 833, 834.

[4] For the general principles relating to larcenies by common carriers, &c., see ante, § 833, 834.

[5] From Reg. *v.* Evans, Car. & M. 632, it would seem that the employment need not even be for hire; and such is probably the true view.

[6] Rex *v.* Fletcher, 4 Car. & P. 545; Rex *v.* Howell, 7 Car. & P. 325. See Rex *v.* Pratley, 5 Car. & P. 533; Dame *v.* Baldwin, 8 Mass. 518; Rex *v.* Jones, 7 Car. & P. 151; Reg. *v.* Jenkins, 9 Car. & P. 38; Reg. *v.* Colhoun, 2 Crawf. & Dix C. C. 57; Moss *v.* Bettis, 4 Heisk. 661.

[7] Commonwealth *v.* Brown, 4 Mass. 580.

[8] Reg *v.* Jackson, 2 Moody, 32. See Rex *v.* Stock, 1 Moody, 87.

[9] Rex *v.* McNamee, 1 Moody, 368.

[10] Reg *v.* Hey, Temp. & M. 209, 1 Den. C. C. 602, 2 Car. & K. 983, 14 Jur 154.

been deemed a bailee, who, though he sells the animal with felonious intent, instead of executing the trust, is still exempt from the charge of larceny.[1]

§ 860. **Breaking Bulk.** — As to what is a breaking of bulk by a carrier, which if done with felonious intent constitutes larceny,[2] a case in Massachusetts apparently decides, that it is such breaking to separate one entire package from several intrusted to the carrier, though no individual package is broken.[3] But this as general doctrine cannot be maintained. Perhaps it was intended to apply only to the particular case, which was that of a wagon load of packages to be transported in a body.[4] For, under other circumstances, the exact duty of the carrier may be to separate the packages; as, for instance, in transferring them from one vehicle to another; but he may never, even for this purpose, break a package. Therefore the English doctrine requires the particular package to be broken.[5] Thus, where the master and owner of a ship steals a package out of several delivered him to carry — as a single cask of butter from among many casks — without removing any thing from the particular package;[6] or where a carrier on land takes one truss of hay from a parcel of three trusses, but does not break open the truss taken;[7] or where a letter-carrier abstracts bank-notes from a directed envelope;[8] or where a drover of sheep removes one sheep from the flock;[9] such person does not commit larceny, however felonious his intent. But if the carrier separates one bank-bill from a package of bills;[10] or one stave from a parcel of staves;[11] the consequence is the other way. And probably, if he

[1] Reg. *v.* Goodbody, 8 Car. & P. 665; Rex *v.* Reilly, Jebb, 51; Reg. *v.* Hey, supra.

[2] Ante, § 834.

[3] Commonwealth *v.* Brown, 4 Mass. 580. And see Dane *v.* Baldwin, 8 Mass. 518. The case of Commonwealth *v.* Brown may perhaps be deemed to have turned on the point that the defendant was not a common carrier.

[4] See post, § 871.

[5] Rex *v.* Madox, Russ. & Ry. 92; Reg. *v.* Cornish, Dears. 425, 6 Cox C. C. 432, 33 Eng. L. & Eq. 527.

[6] Rex *v.* Madox, supra.

[7] Rex *v.* Pratley, 5 Car. & P. 533; s. p. in New York, People *v.* Nichols, 3 Parker C. C. 579, but afterward the other way, and in accordance with the Massachusetts doctrine, in the higher court by a majority of the judges. Nichols *v.* People, 17 N. Y. 114.

[8] Reg. *v.* Glass, 1 Den. C. C. 215, 2 Car. & K. 395. See Reg. *v.* Jenkins, 9 Car. & P. 38; Rex *v.* Jones, 7 Car. & P. 151.

[9] Rex *v.* Reilly, Jebb, 51.

[10] Reg. *v.* Colhoun, 2 Crawf. & Dix C. C. 57.

[11] Rex *v.* Howell, 7 Car. & P. 325. There is no mention in this case, that the staves were tied together; and they seem not to have been. See also post, § 870, 871.

has broken bulk, and stolen a part, he may then steal the remainder without a further breaking.[1]

§ 861. **Goods reaching Destination.** — On the question of the goods being fully transported, so that the carrier may commit larceny of them by a felonious taking without breaking bulk,[2] Lord Hale says, "that must be intended when he carries them to the place, and delivers or lays them down; for then his possession by the first delivery is determined, and the taking afterwards is a new taking."[3]

§ 862. **Receiving with Intent to steal.** — But the reader should remember, that a common carrier who receives goods intending to steal them (the person delivering them not meaning to part with the property, but only the possession) commits larceny in the receiving; and no breaking of bulk or other subsequent act is required.[4]

§ 863. **Statutes changing Common-law Rules.** — In some of the States, statutes have abolished the distinction which protects bailees; and they are answerable for the larceny of goods in their possession, at whatever time the intent to steal arises. In Missouri, the words are: "If any carrier or other bailee shall embezzle or convert to his own use, or make way with or secrete with intent to embezzle or convert to his own use, any money, goods, rights in action, property, or valuable security, or effects which shall have been delivered to him, or shall have come to his possession or under his care as such bailee, although he shall not break any trunk, package, box, or other thing in which he received them, he shall on conviction be adjudged guilty of larceny."[5] But it is perceived that the offence created by this is in the nature of embezzlement.

§ 864. **Hirer of Goods.** — The hirer of goods is a bailee, with the relation to them already explained.[6] Therefore, —

[1] See Reg. *v.* Poyser, 4 Eng. L. & Eq. 565, 2 Den. C. C. 233; post, § 871.

[2] Ante, § 834.

[3] 1 Hale P. C. 504, 505; 2 East P. C. 696. See post, § 864, 865.

[4] Ante, § 813, 857; The State *v.* Thurston, 2 McMullan, 382; Reg. *v.* Hey, Temp. & M. 209, 1 Den. C. C. 602, 2 Car. & K. 983, 14 Jur. 154; People *v.* Smith, 23 Cal. 280.

[5] Norton *v.* The State, 5 Misso. 461. And see The State *v.* Haskell, 33 Maine, 127; Commonwealth *v.* Williams, 3 Gray, 461; White *v.* The State, 20 Wis. 233; Commonwealth *v.* Chathams, 14 Wright, Pa. 181; Defrese *v.* The State, 3 Heisk. 53; Phelps *v.* People, 55 Ill. 334; Stat. Crimes, § 420.

[6] Ante, § 834, 857-863. And see Reg. *v.* Brooks, 8 Car. & P. 295.

Hirer of Horse. — If one hires a horse, and sells it before the journey is performed; or sells it after, but before it is returned;[1] he commits no larceny, in a case where the felonious intent came upon him subsequently to receiving it into his possession.[2] But where the prisoner had a horse from a livery-stable in London, to go to Barnet, the jury were instructed, that, when he had accomplished the journey, and also brought the horse back to London, which under the contract of hiring he was bound to do, then, if instead of delivering it to the owner he "converted it after such return to his own use, he is thereby guilty of felony; for the end and purpose of hiring the horse would be then over."[3] And if one hiring a horse intends, when he receives it, to convert it to his own use, he thereby commits larceny.[4] No subsequent act of sale or conversion is, in such a case, necessary to complete the offence.[5]

§ 865. **Countermand of Bailment.** — A mere countermand of a bailment, with no resumption of possession, is not deemed sufficient to charge the bailee with larceny, if he misappropriates the article afterward. But where the bailee of a mare took her to a livery-stable, went to the owner and told him she was there, and settled with him the accounts concerning her; then the owner forbade him to take her again, and sent directions to the stable-keeper not to let him have her, but he got her of the latter by a false representation; the judges held, that he was rightly convicted of larceny; because the jury might infer, as they did, that the bailment was terminated, and the possession had reverted to the owner.[6]

§ 866. **Furniture let to Lodgers.** — One who hires furnished r oms stands on the same ground, as to the furniture, with other hirers of goods. Unless he meant to steal it when taking possession,[7]

[1] Ante, § 861.

[2] Rex *v.* Banks, Russ. & Ry. 441; Rex *v.* Charlewood, 1 Leach, 4th ed. 409, 2 East P. C. 689. Otherwise in Missouri by statute, Norton *v.* The State, 4 Misso. 461; ante, § 862.

[3] Rex *v.* Charlewood, 1 Leach, 4th ed. 409. S. P. Reg. *v.* Haigh, 7 Cox C. C. 403. See also Commonwealth *v.* White, 11 Cush. 483; Richards *v.* Commonwealth, 13 Grat. 803; White *v.* The State, 11 Texas, 769; The State *v.* Cameron, 40 Vt. 555; Perham *v.* Coney, 117 Mass. 102.

[4] The State *v.* Williams, 35 Misso. 229. See Reg. *v.* Kendall, 12 Cox C. C. 598, 8 Eng Reg. 609.

[5] Reg. *v.* Janson, 4 Cox C. C. 82, overruling Reg. *v.* Brooks, supra.

[6] Rex *v.* Stear, 1 Den. C. C. 349, Temp. & M. 11, 13 Jur. 41. See post, § 874.

[7] 2 East P. C. 585; 1 Hawk. P. C. Curw. ed. p. 146, § 24; ante, § 862.

he does not commit larceny if, in pursuance of a subsequent felonious intent, he sells or carries it away.[1]

Old Statute. — By 3 Will. & M. c. 9, § 5 (A. D. 1691), it was made felony to remove furniture from hired lodgings, with intent to steal it;[2] but the date of this enactment is subsequent to the settlement of our older colonies; and Kilty says, this particular section "does not appear, from an examination of the provincial records, to have extended" to Maryland.[3]

§ 867. **Goods delivered for Work to be done on them.** — East says: "If a weaver or silk throwster deliver yarn or silk to be wrought by journeymen in his house, and they carry it away with intent to steal it, it is felony; for the entire property remains there only in the owner, and the possession of the workmen is the possession of the owner. But if the yarn had been delivered to a weaver out of the house, and he, having the lawful possession of it, had afterwards embezzled it, this would not be felony; because by the delivery he had a special property, and not a bare charge; in the same manner as one who is intrusted with the care of a thing for another to keep for his use."[4] So if a watchmaker honestly receives a watch to repair; and, from a corrupt purpose afterward coming to him, sells it for his own benefit, he does not commit larceny.[5]

§ 868. **Breaking Bulk in these Cases.** — But the doctrine of breaking bulk[6] applies in these cases. Therefore, —

Miller. — If a miller steals some of the meal made from corn delivered him to grind, he commits larceny.[7] And when one received barilla to grind, but fraudulently retained a part of it,

[1] Rex *v.* Raven, J. Kel. 24; Rex *v.* Meeres, 1 Show. 50.

[2] Note to Rex *v.* Meeres, supra.

[3] Kilty Report of Statutes, p. 179. So the Pennsylvania judges do not mention it as in force in Pennsylvania, though they mention other statutes of much later dates. Report of Judges, 3 Binn. 595. Its words are: "If any person or persons shall take away, with an intent to steal, embezzle, or purloin, any chattel, bedding, or furniture, which by contract or agreement he or they are to use, or shall be let to him or them to use, in or with such lodging, such taking, embezzling, or purloining shall be to all intents and purposes taken, reputed, and adjudged to be larceny and felony, and the offender shall suffer as in the case of felony."

[4] 2 East P. C. 682. And see Reg. *v.* Saward, 5 Cox C. C. 295; Commonwealth *v.* Superintendent, 9 Philad. 581; The State *v.* Jones, 2 Dev. & Bat. 544.

[5] Reg. *v.* Thristle, 1 Den. C. C. 502, 3 Cox C. C. 573, 2 Car. & K. 842, 13 Jur. 1035; Rex *v.* Levy, 4 Car. & P. 241, Vaughan, B., observing: "It would have been different if the prisoner had obtained the watch by trick or fraud."

[6] Ante, § 834, 860.

[7] 2 East P. C. 698.

returning a mixture of barilla and plaster of Paris, he was adjudged guilty of this offence.[1]

Repairer of Furniture. — Where also one has intrusted to him, for repair, a bureau in a secret drawer of which he discovers money, if he breaks open the drawer unnecessarily, and abstracts the money, converting it to his own use, he commits the offence; while, if his intent is to keep the money for the owner, he is not criminal.[2]

§ 869. **Animals to keep and Feed.** — If one receives a horse to agist, and afterward sells it for his own benefit, he does not commit larceny, in a case where there was no felonious intent in the original taking.[3]

§ 870. **Warehouse-men.** — Where a warehouse-man received on storage forty bags of wheat, without authority to sell, or "to make any alteration in the wheat, or to open the bags in order to show them, or for any other purpose;" and he separated with felonious intent some of the bags from the rest, opening those particular bags and appropriating all in each to his own use, this was held to be larceny. The judges deemed, "that the taking the whole of the wheat out of any one bag was no less a larceny than if the prisoner had severed a part from the residue of the wheat in the same bag, and had taken only that part, leaving the remainder of the wheat in the bag."[4]

§ 871. **Dealers on Commission.** — One was employed to sell clothes about the country on commission. The owner fixed the price for which each article should be sold, and the money was to be returned with the unsold goods. This traveller, on one occasion, instead of making any sale from the parcel received, pawned fraudulently a part and applied the residue to his own use. And it was held, that there was but a single bailment of the articles forming the parcel; that the unlawful pawning of a part terminated this bailment; and that, consequently, the

[1] Commonwealth *v.* James, 1 Pick. 375.

[2] Cartwright *v.* Green, 2 Leach, 4th ed. 952, 8 Ves. 405, Lord Eldon observing also: **Tailor abstracting Pocket-book.** — "If a pocket-book containing bank-notes were left in the pocket of a coat sent to be mended, and the tailor took the pocket-book out of the pocket, and the notes out of the pocket-book, there is not the least doubt that it is felony." See also Merry *v.* Green, 7 M. & W. 623.

[3] Rex *v.* Smith, 1 Moody, 473. And see Reg. *v.* Leppard, 4 Fost. & F. 51.

[4] Rex *v.* Brazier, Russ. & Ry. 337. See ante, § 860.

subsequent fraudulent appropriation of the residue was a larceny.[1]

§ 872. *Husband and Wife, and Persons receiving from each the Goods of the other:* —

Wife. — In consequence of the intimate legal relationship created by marriage, the wife can never commit the trespass necessary in larceny, by taking the husband's goods.[2]

Husband. — And for precisely the same reason, if the wife has goods which she holds to her separate use under statutes prevailing of late in most of our States, the husband cannot commit larceny of them.[3]

§ 873. **Person receiving from Wife — from Husband.** — There are cases which seem to assume, that, in the absence of any adulterous misconduct, a third person who receives the husband's goods from the wife is, in like manner, protected.[4] If this doctrine is sound, it also protects the receiver of the wife's goods from the husband. That, *prima facie*, such a person cannot be charged with larceny is plain in principle; because, in a case of felony, authority in husband or wife to dispose of the other's goods should be presumed. But there is, in principle, reason for not carrying the doctrine further.[5]

Adulterer receiving from Wife. — And it is settled that a man who has committed adultery with the wife, or who elopes with her intending to commit it, cannot protect himself on a charge of larceny, by showing a delivery of the goods to him by her. The reason is sometimes assumed to be, that he knows he has not the husband's consent in the wife's.[6] Hence, —

[1] Reg. *v.* Poyser, 4 Eng. L. & Eq. 565, 2 Den. C. C. 233. See ante, § 865.

[2] 1 Hawk. P. C. Curw. ed p. 147, § 32; Rex *v.* Willis, 1 Moody, 375; Reg. *v.* Tollett, Car. & M. 112; Reg. *v.* Glassie, 7 Cox C. C. 1.

[3] 2 Bishop Mar. Women, § 152, 153.

[4] Authorities cited in the last two notes; also, Rex *v.* Harrison, 1 Leach, 4th ed. 47, 2 East P. C. 559; Reg. *v.* Fitch, Dears. & B. 187. But see Reg. *v.* Glassie, 7 Cox C. C. 1, 2.

[5] 2 Bishop Mar. Women, § 154.

[6] People *v.* Schuyler, 6 Cow. 572; Reg. *v.* Thompson, 2 Crawf. & Dix C. C. 491; Reg. *v.* Tollett, Car. & M. 112; Reg. *v.* Harrison, 12 Cox C. C. 19, 2 Eng. Rep. 174; 3 Greenl. Ev. § 158. Where the prisoner and the prosecutor's wife had jointly occupied themselves in removing the goods, he carrying boxes of things to the cart which took the things away, and the two then went off together, the presiding magistrate told the jury, "that, if they were satisfied that the prisoner and the prosecutor's wife, when they so took the property, went away together for the purpose of having adulterous intercourse, and had afterwards effected that criminal purpose, they ought to find the prisoner guilty; but that, if . . . they did not go away with any such criminal purpose, and had never committed adultery together at

Husband dissenting. — From this it might be inferred, that, though there is no adultery, if the husband expressly forbids the taking on the wife's delivery, such taking, feloniously meant, will be larceny. It is not clear that the courts — at least, all courts — will go to this extent.[1] Is it material whether the taking was on the wife's *delivery*, or directly by the thief with her concurrence? In a case of the latter sort, the New York court laid down the doctrine, that, though there is no adultery actual or contemplated, still, if one intending to steal goods which he knows to be the husband's, carries them away in the wife's presence and with her consent, knowingly against the consent of the husband, he commits larceny of them.[2] In England, a case passed to judgment perhaps not quite in harmony with this doctrine, yet not distinctly in conflict with it.[3]

all, the prisoner would be entitled to his acquittal;" and this instruction was held, by the court of criminal appeal, to be right. Reg. *v.* Berry, Bell C. C. 95, 8 Cox C. C. 117.

[1] See Reg. *v.* Featherstone, infra, and the note in 1 Ben. & H. Lead. Cas. 199; Reg. *v.* Tollett, Car. & M. 112; 1st Rep. Eng. Crim. Law Com. A. D. 1834, p. 18, pl. 14.

[2] People *v.* Cole, 43 N. Y. 508. Grover, J., who delivered the opinion of the court, put the whole doctrine of larceny when adultery is intended or committed, upon the ground, that, in such circumstances, the thief knows he has not the consent of the husband; adding, — "Any other evidence that satisfies the jury that the prisoner knew the taking was against the will of the husband, although with the consent of the wife, will show him guilty of larceny, equally with proof that the property was taken to facilitate adulterous intercourse with the wife." p. 511.

[3] The case was this: The uncle and cousin of the wife, who was about to leave the house and cohabitation of her husband, came, in the night as well as afterward in the day, and with her privity, but secretly as respects him, carried off beds, carpets, and other things belonging to him; and then denied their possession of the goods. "The jury found, that the prisoners took the goods without the knowledge or consent of the husband, and with the intention to deprive him absolutely of his property in them." A verdict of guilty was ordered on these facts and this special finding; and the judges, on a case reserved, held it to be wrong. "No adultery," said Cockburn, C. J., "is shown to have taken place between either of the prisoners and the prosecutor's wife, nor is it found that any was intended. The goods were taken in the presence, with the privity and consent, of the wife when she was abandoning her husband's dwelling. It is not necessary to lay it down as law, that, supposing a stranger stole the goods of a husband, and the wife was privy to it, and consenting, such privity and consent on the part of the wife would, if there was *animus furandi* in the stranger, exonerate him from what would otherwise be larceny. In deciding that this conviction should be quashed, it is not necessary to adopt that doctrine; but, on the other hand, we take it to be clear that a wife cannot be guilty of larceny in simply taking the goods of her husband; and, if a stranger do no more than merely assist her in the taking, inasmuch as the wife, as principal, cannot be guilty of larceny, the stranger, as accessory, cannot be guilty. In this case, it was not left to the jury to say, whether the prisoners were acting as principals when the act was done, or whether the wife

§ 874. **Adulterer, again.** — To charge an adulterer, a mere delivery of the goods by the wife, at his lodgings, is not sufficient. There must be a personal taking by him, or they must be shown to be in his possession.[1] Yet such taking on delivery from her hands will do;[2] and so will a joint carrying away by the two.[3]

Wife's Clothes. — If a wife and adulterer elope together, carrying her clothes, he commits larceny of the clothes; for they are the husband's property.[4] So it has been ruled in England; but, in a case reserved, the judges refused to sustain a conviction where the wife and the adulterer were apprehended while walking away from the husband's house together, he carrying some of her personal apparel in a bandbox; Cockburn, C. J., observing, that "he was only assisting in carrying away the necessary wearing apparel of the wife."[5]

Old Statute. — Lord Hale, moreover, mentions, that, "if a man take away another man's wife against her will, *cum bonis viri*, this is felony by the statute of Westm. 2, c. 34."[6] No reason appears

was the principal and the prisoners merely aiding and assisting her. That finding might have raised the question; but, in its absence, we must assume that state of the case which is most favorable to the prisoners, and the conviction must be quashed." Reg. *v.* Avery, Bell C. C. 150, 153, 154, 8 Cox C. C. 184.

[1] Reg. *v.* Rosenberg, 1 Car. & K. 233, 1 Cox C. C. 21; Reg. *v.* Taylor, 12 Cox C. C. 627, 10 Eng. Rep. 509.

[2] Reg. *v.* Featherstone, Dears. 369, 18 Jur. 538, 26 Eng. L. & Eq. 570, 6 Cox C. C. 376, 1 Ben. & H. Lead. Cas. 199.

[3] Reg. *v.* Thompson, 1 Den. C. C. 549, Temp. & M. 294, 14 Jur. 488, 1 Eng. L. & Eq. 542; Rex *v.* Tolfree, 1 Moody, 243; Reg. *v.* Mutters, Leigh & C. 511.

[4] Reg. *v.* Tollett, Car. & M. 112. And see Reg. *v.* Glassie, 7 Cox C. C. 1.

[5] Reg. *v.* Fitch, Dears. & B. 187.

[6] 1 Hale P. C. 514. This statute is otherwise cited as 13 Edw. 1, stat. 1, c. 34. It is plainly enough common law in this country, as far as applicable to our situation. But the words of it do not expressly cover the proposition stated by Lord Hale; and I cannot certainly derive it by inference; though perhaps it comes from the clause about "women carried away with the goods of their husbands." The entire enactment is as follows: "It is provided, that, if a man from henceforth do ravish a woman married, maid, or other where she did not consent, neither before nor after, he shall have judgment of life and of member. And likewise where a man ravisheth a woman married, lady, damsel, or other, with force, although she consent after, he shall have such judgment as before is said, if he be attainted at the king's suit, and there the king shall have the suit. And of women carried away with the goods of their husbands, the king shall have the suit for the goods so taken away. And if a wife willingly leave her husband and go away, and continue with her advouterer, she shall be barred for ever of action to demand her dower, that she ought to have of her husband's lands, if she be convict thereupon, except that her husband willingly, and without coercion of the church, reconcile her, and suffer her to dwell with him; in which case she shall be restored to her action. He that carrieth a nun from her house, although she consent, shall be punished by three years' imprisonment, and shall make convenient satis

why this should not be larceny also by the more ancient common law.

Husband's Servant as Adulterer. — Though a man is in the husband's employ as servant, and takes the goods by command of the wife, still if it is done in the course of an adulterous elopement with her, he commits larceny, or not, precisely like one who is not a servant.[1]

§ 875. *Things concealed, wrecked, or astray:* —

What is Treasure-trove. — Coke says: "Treasure-trove is when any gold or silver, in coin, plate, or bullion, hath been of ancient time hidden, wheresoever it be found whereof no person can prove any property; it doth belong to the king, or to some lord or other of the king's grant, or prescription. The reason wherefore it belongeth to the king is a rule of the common law, that such goods whereof no person can claim property belong to the king; as wrecks, estrays, &c." It must be gold or silver; "for if it be of any other metal, it is no treasure; and, if it be no treasure, it belongs not to the king, for it must be treasure-trove. It is to be observed, that veins of gold and silver in the grounds of subjects belong to the king by his prerogative, for they are royal mines, but not of any other metal whatsoever in subjects' grounds. Whether it be of ancient time hidden in the ground, or in the roof, or walls, or other part of a castle, house, building, ruins, or elsewhere," is immaterial, "so as the owner cannot be known."

Misdemeanor of Concealing. — The concealment of treasure-trove is, by the common law, a misdemeanor punishable by fine and imprisonment.[2]

faction to the house from whence she was taken, and nevertheless shall make fine at the king's will."

[1] Reg *v.* Mutters, Leigh & C. 511. And see the English reporter's note, citing and reviewing the cases on this general subject.

[2] 3 Inst. 132. In 1863, there was a conviction in England for the concealment of treasure-trove, on the following facts: A laborer was ploughing in some grounds; and the share of his plough, going deeper than any ploughshare had done before, turned up what he supposed to be pieces of old brass. It was, in truth, gold. Some other persons, ascertaining it to be gold, but keeping their discovery from him, bought it of him for brass, and sold it for gold, thus realizing over £500. They were indicted for concealing the treasure-trove, and convicted, and the conviction was held to be good. "The law is clear," said Erle, C. J., "that the queen has a right to treasure-trove, and the finder must not hinder the finding from becoming known. The facts here are, that Butcher [the laborer who ploughed up the gold] is an innocent finder, and thinks the treasure-trove is brass. The prisoners, on the

§ 876. **Larceny of Treasure-trove — (Wreck — Waif — Estray).** — "And," according to the old books, "he who takes away treasure-trove, or a wreck, waif, or stray, before they have been seized by the persons who have a right thereto, is not guilty of felony."[1] But this doctrine has some modern limitations, growing principally out of statutes, which give a particular ownership in these things; and out of more accurate notions, prevalent in later times, concerning the larceny of lost goods.[2]

Estray Beasts, with us. — In our States, there are statutory regulations concerning beasts astray. But they are not uniform.[3]

other hand, knowing it to be gold, and how it has been found, take it as brass, and sell it as gold, and tell falsehoods in order to conceal the transaction." Martin, B., made the following observation, which may, or may not, be held hereafter to qualify the doctrine respecting this offence: "I am inclined to think, that the first person who conceals the treasure is guilty, and not those into whose possession it comes subsequently. If, therefore, Butcher had known that the treasure was gold, I should have doubted whether the prisoners could have been convicted. Here, however, it is clear that Butcher was an innocent agent." Reg. *v.* Thomas, Leigh & C. 313, 325, 326. Another case of concealment of treasure-trove, particularly as to the form of indictment and as to the evidence, is Reg. *v.* Toole, Ir. Rep. 2 C. L. 36, 11 Cox C. C. 75.

[1] 1 Hawk. P. C. Curw. ed. p. 149, § 38; Hammond on Larceny, parl. ed. p. 21, pl. 28; 1 Hale P. C. 510; 2 Russ. Crimes, 3d Eng. ed. 86, 87.

[2] See ante, § 838; post, § 878–883. This subject is considerably discussed by Parke, B., in Reg. *v.* Thurborn, 1 Der C. C. 387, 2 Car. & K. 831, Temp. & M. 67. He said: "Treasure-trove and waif seem to be subject to a different construction from goods lost. **Treasure-trove — Waif.** — Treasure-trove is properly money supposed to have been hidden by some owner since deceased, the secret of the deposit having perished, and therefore belongs to the Crown; as to waif, the original owner loses his right to the property by neglecting to pursue the thief. The very circumstances under which these are assumed to have been taken and converted show that they could not be taken from any one, there being no owner. **Wreck — Estray.** — Wreck and stray are not exactly on the same footing as treasure-trove and waif; wreck is not properly so called if the real owner is known, and it is not forfeited until after a year and a day. The word estray is used in the books in different senses; as . . . where it is used in the sense of cattle forfeited after being in a manor one year and one day without challenge after being proclaimed, where the property vests in the Crown or its grantee of estrays and also of cattle straying in the manor." The whole of this opinion may be read with great profit. As to waif in this country, see Vol. I. § 970. **Derelict.** — As to what is derelict, in the sense of the admiralty, and what are the consequences of the doctrine, see The Bee, Ware, 332; Tyson *v.* Prior, 1 Gallis. 133; The Boston, 1 Sumner, 328; The Henry Ewbank, 1 Sumner, 400; Flinn *v.* Leander, Bee, 260; Wilkie *v.* Brig St. Petre, Bee, 82; Sheldon *v.* Sherman, 42 N. Y. 484. **Wreck, again.** — Where one had removed a valuable article, part of a wreck, from a wharf on which it had been placed, and afterward denied the possession of it, the question submitted to the jury on an indictment for the larceny of this article was, whether, when he took it, he meant to steal it. Reg. *v.* Hore, 3 Fost. & F. 315.

[3] Stat. Crimes, § 462; Walters *v.* Glats, 29 Iowa, 437.

And the question of the larceny of such beasts will depend much on these regulations. In Missouri, an estray may be the subject of larceny before it is posted, and the indictment properly lays the ownership in a person unknown.[1] In Texas, it is held that there can be no larceny of a horse which has run astray for years without a known owner; because there can be no intent to deprive one of property in the animal.[2]

§ 877. **Seaweed.** — In a late Irish case, the court held, one judge dissenting, that, though a man owns the shore of the sea, between high and low water mark, yet if he has not gathered the seaweed drifted there, another cannot commit larceny by taking it away. "It would be difficult to say," observed Whiteside, C. J., "that a man had a determinate property in seaweed floating, as was boldly insisted, between high and low water mark, and that he could pursue a bit of seaweed which had once touched his part of the shore and then floated out again to sea, and then touched or drifted on his neighbor's land." [3]

§ 878. *Lost Goods:* [4] —

Distinctions — (Abandoned — Lost — Mislaid). — The owner of goods need not keep a constant manual possession of them, to be protected in his rights of ownership. And though he forgets the place in which he laid them, or though for any other reason he knows not where they are, still they remain his. But he may abandon his property therein, and then it will vest in him who first takes possession with the intent to appropriate them as his own.

No Larceny of Things abandoned. — This appropriation is not larceny; and so the offence cannot be committed of abandoned goods.[5]

§ 879. **Mislaid.** — If a thing is mislaid, it is not therefore abandoned, neither is it lost. Thus, when a man getting a bill changed in a shop, laid his pocket-book on the table and went away; but, on missing it, immediately remembered where he had left it; the court held, on an indictment for stealing it, that this

[1] The State *v.* Casteel, 53 Misso. 124. See post, § 882, note.

[2] Johnson *v.* The State, 36 Texas, 375; Ritcher *v.* The State, 38 Texas, 643. See Reg. *v.* Matthews, 12 Cox C. C. 489, 6 Eng. Rep. 329; Debbs *v.* The State, 43 Texas, 650; Starck *v.* The State, 63 Ind. 285; Owens *v.* The State, 7 Texas Ap. 470.

[3] Reg. *v.* Clinton, Ir. Rep. 4 C. L. 6, 15. And see post, § 959 and note.

[4] See ante, § 838.

[5] See 2 East P. C. 606; Reg. *v.* Reed, Car. & M. 306, 308; Reg. *v.* Peters, 1 Car. & K. 245; McGoon *v.* Ankeny, 11 Ill. 558

was not a case of lost property.[1] And the same was held, where a purchaser, at a market, left accidentally his purse on the prisoner's stall, neither he nor the prisoner knowing then of the mistake.[2] *A fortiori* this was so where one put a bucket of peas on a stranger's cart which he mistook for a friend's.[3] Larceny can be committed in these cases, precisely as though the thing were not mislaid.

Appearing to be Lost. — If the goods appear to be lost, but are not so in fact, the defendant, who relied on this appearance, may claim to have the case treated as if they were lost; for, on the question of intent, a party honestly misled concerning facts is to be judged of the same as if they were what he believes them to be.[4]

§ 880. **Whether Larceny of Goods really lost.** — Assuming goods to be really lost, the Tennessee doctrine seems, not quite certainly, to be, that no larceny of them is possible.[5] But the Eng-

[1] Lawrence *v.* The State, 1 Humph. 228.

[2] Reg. *v.* West, Dears. 402, 24 Law J. N. S. M. C. 4, 18 Jur. 1031, 29 Eng. L. & Eq. 525, Jervis, C. J., observing: "There is a clear distinction between property lost, and property merely mislaid, put down, and left by mistake, as in this case, under circumstances which would enable the owner to know the place where he had left it, and to which he would naturally return for it. The question as to possession by finding therefore does not arise." And see People *v.* Swan, 1 Parker C. C. 9; People *v.* McGarren, 17 Wend. 460; The State *v.* Williams, 9 Ire. 140; Rex *v.* Wynne, 1 Leach, 4th ed. 413, 2 East P. C. 664, 697; Rex *v.* Sears, 1 Leach, 4th ed. 415, note; The State *v.* McCann, 19 Misso. 249; Pritchett *v.* The State, 2 Sneed, 285; Pyland *v.* The State, 4 Sneed, 357.

[3] He went away to inquire their market price, and, on returning, found the owner of the cart, a vegetable dealer, carrying off the bucket, with beets and lettuce so piled on as to conceal the peas, and insolent and unwilling to surrender it on demand. The man was convicted of larceny. The State *v.* Farrow, Phillips, 161.

[4] Vol. I. § 303; Reg. *v.* Thurborn, 1 Den. C. C. 387, 389; Reg. *v.* Peters, 1 Car. & K. 245. And see 2 East P. C. 664.

[5] Lawrence *v.* The State, 1 Humph. 228; Porter *v.* The State, Mart. & Yerg. 226. In Morehead *v.* The State, 9 Humph. 635, 639, this question was discussed; — and the court held, that a runaway slave may be the subject of larceny. McKinney, J., said: "Lost property is looked upon, for some purposes, as abandoned by the former proprietor; and, as such, is returned into the common stock, or mass of things; and, therefore, as belonging to the first occupant or finder. And though the former proprietor is entitled to maintain an action for the recovery, yet, as against all other persons, the title vests in the finder. Therefore, though it may have been converted *animo furandi*, by the person finding it, it is no larceny, because the first taking was lawful. But this principle properly applies, perhaps, only to inanimate things, which cannot be transferred from or cease to be in the possession of the owner, without his own or another's act or default. It cannot, certainly, to the same extent, be applied even to animals, which possess the instinct and power of motion, and can remove themselves from place to place; though these may be

lish courts, and generally the American, allow of this offence as to such goods under certain circumstances.[1] Also, during slavery, statutory larcenies might be committed of runaway slaves; they, however, not being generally regarded exactly as lost property.[2]

§ 881. **How committed of Lost Goods.** — The prevailing doctrine, which may be subject to minute differences among our States, is, that the finder of lost goods may appropriate them to himself, subject to the claim of the owner, and to any claim in the public which a statute has established, — a point, however, depending much upon the particular statutory law of the State in which the question arises.[3] He, therefore, gains, immediately upon the finding, a special or particular kind of property in the goods:[4] and, as we have seen,[5] the nature of this special property is such, that, where there is no larceny in the original taking, there can be none in any subsequent misappropriation, even by breaking bulk, with a full knowledge of the true ownership.

§ 882. **Continued.** — Unless, therefore, there is a larceny in the original taking, there can be none committed afterward.[6] But the case stands somewhat on the doctrine stated in pages back,[7] that, if one receives, even on delivery from the owner, goods which he means when he receives them to steal, he commits the crime, provided the consent of the owner to the taking does not extend to a full and unconditional title. The law gives to the finder a title in lost goods, but not full and unconditional; and so, if he takes them with the intent to steal them, he commits a

lost in some instances, in the proper sense of the term." p. 637. s. p. Cash *v.* The State, 10 Humph. 111. See post, § 882, note.

[1] Reg. *v.* Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Temp. & M. 67; s. c. nom. Reg. *v.* Tharbone, 13 Jur. 499; s. c. Reg. *v.* Wood, 3 New Sess. Cas. 581; Reg. *v.* Peters, 1 Car. & K. 245; Ransom *v.* The State, 22 Conn. 153; Tanner *v.* Commonwealth, 14 Grat. 635. And see the other cases cited to the next section.

[2] Murray *v.* The State, 18 Ala. 727; The State *v.* Miles, 2 Nott & McC. 1; Morehead *v.* The State, 9 Humph. 635; Cash *v.* The State, 10 Humph. 111; The State *v.* Williams, 9 Ire. 140; Randal *v.* The State, 4 Sm. & M. 349; The State *v.* Clayton, 11 Rich. 581. See Nelson *v.* Whetmore, 1 Rich. 318. But see Commonwealth *v.* Hays, 1 Va. Cas. 122.

[3] And see The State *v.* Jenkins, 2 Tyler, 377, 379; The State *v.* Apel, 14 Texas, 428; Lawrence *v.* Buck, 62 Maine, 275; The State *v.* Taylor, 25 Iowa, 273.

[4] Reg. *v.* Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Temp. & M. 67; s. c. nom. Reg. *v.* Tharbone, 13 Jur. 499.

[5] Ante, § 838.

[6] Reg. *v.* Matthews, 12 Cox C. C. 489, 6 Eng. Rep. 329; Reg. *v.* Deaves, Ir Rep. 3 C. L. 306, 11 Cox C. C. 227; Reg. *v.* Christopher, Bell C. C. 29, 8 Cox C. C. 91; Reg. *v.* Shea, 7 Cox C. C. 147; Reg. *v.* Gardner, Leigh & C. 243, 9 Cox C. C. 253.

[7] Ante, § 804, 809, 811–813.

larceny, unless this consequence is prevented by the operation of the principles now to be mentioned. A man, knowing the owner of goods, cannot lawfully pick them up, without returning them to him; but a man, not knowing the owner, can. The doctrine therefore is, that, if, when one takes goods into his hands, he sees about them any marks,[1] or otherwise learns any facts,[2] by which he knows who the owner is, yet with felonious intent appropriates them to his own use, he is guilty of larceny; otherwise, not.[3] Some of the cases say, if he knows who the owner is, or *has the means of ascertaining;*[4] but the better doctrine is as

[1] Lane *v.* People, 5 Gilman, 305; The State *v.* Conway, 18 Misso. 321; People *v.* McGarren, 17 Wend. 460; Anonymous, 2 Russ. Crimes, 3d Eng. ed. 14.

[2] Reg. *v.* Dixon, 36 Eng. L. & Eq. 597, Dears. 580; People *v.* Cogdell, 1 Hill, N. Y. 94; The State *v.* Ferguson, 2 McMullan, 502; People *v.* Swan, 1 Parker C. C. 9. And see The State *v.* Cummings, 33 Conn. 260.

[3] Reg. *v.* Glyde, Law Rep. 1 C. C. 139; Reg. *v.* York, 12 Jur. 1078; The State *v.* Roper, 3 Dev. 473; Reg. *v.* Mole, 1 Car. & K. 417; Tyler *v.* People, Breese, 227; Porter *v.* The State, Mart. & Yerg. 226; Reg. *v.* Reed, Car. & M. 306, 308; Randal *v.* The State, 4 Sm. & M. 349; Reg. *v.* Deaves, Ir. Rep. 3 C. L. 306, 11 Cox C. C. 227. And see People *v.* Kaatz, 3 Parker C. C. 129. But see The State *v.* Jenkins, 2 Tyler, 377, 379. In a Virginia case, the prisoner found in the street a pocket-book with money in it. He took it up and appropriated it to his own use, and denied all knowledge of it. "There is no fact proved," said the judge, "showing that the prisoner, at the time of the finding, knew the owner, or had the means of knowing him, or had reason to believe that he might be found. . . . It was not proved that there was any name or mark on the pocket-book, or other circumstances, to indicate then who was the owner." And this was held not to be larceny. Allen, P., observed: "If there were no marks on the property, or other circumstances indicating the owner, the appropriation to the finder's use does not amount to larceny." Tanner *v.* Commonwealth, 14 Grat. 635, 637. **Estray.** — It is held in Missouri, that a person who drives away cattle which have wandered from the owner's enclosure, and converts them with felonious intent to his own use, is none the less guilty of larceny when he is ignorant of their true owner, and their owner does not know where they are. Said Napton, J.: "Whatever may be the law concerning domestic animals, such as horses and cattle, in England, we do not consider the doctrine of the English criminal lawyers concerning lost goods as applicable to domestic animals in Missouri. It is with no propriety, either in view of custom or statutory law, that animals can be called *lost goods* here, simply because they are outside of the owner's enclosures, and the owner does not know where they are." The State *v.* Martin, 28 Misso. 530, 537. And see The State *v.* Williams, 19 Misso. 389; ante, § 876, 880, note.

[4] The State *v.* Weston, 9 Conn. 527; Reg. *v.* Breen, 3 Crawf. & Dix C. C. 30; Reg. *v.* Kerr, 8 Car. & P. 176; Rex *v.* Pope, 6 Car. & P. 346; Rex *v.* James, 2 Russ. Crimes, 3d Eng. ed. 14; Reg. *v.* West, Dears. 402, 24 Law J. N. S. M. C. 4, 18 Jur. 1031, 29 Eng. L. & Eq 525; Commonwealth *v.* Titus, 116 Mass 42; Reg. *v.* Shea, 7 Cox C. C. 147; Reg. *v.* Knight, 12 Cox C. C. 102, 2 Eng. Rep. 186. See Reg. *v.* Thurborn, 1 Den. C. C. 387, 2 Car. & K. 831, Temp. & M. 67; Ransom *v.* The State, 22 Conn. 153; Reg. *v.* Preston, 2 Den. C. C. 353, 8 Eng. L. & Eq. 589; Rex *v.* Beard, Jebb, 9. In Reg. *v.* Peters, 1 Car. & K. 245, Rolfe, B., observes: "It is perfectly well known, that, if a person leave any thing in a stage-coach, if the owner can be found

above set down, because every man by advertising and inquiring can find the owner, if he is to be found, while the guilt of a defendant must attach at the moment, if ever, without depending on an if.[1]

§ 883. **Special Cases.** — Though the doctrine, for all ordinary cases, is thus plain, special circumstances will sometimes arise. Thus, —

Note dropped in Shop. — The prisoner was a hair-dresser, and the prosecutor had accidentally dropped a £10 note in his shop; but, the next morning, discovering its loss, had gone back and inquired for it of the hair-dresser, who denied all knowledge of it. The jury found specially, "1. That the note was dropped by the prosecutor in the shop, and that the prisoner found it there. 2. That the prisoner, at the time he picked up the note, did not know, nor had he reasonable means of knowing, who the owner was. 3. That he afterwards acquired knowledge who the owner was, and after that he converted the note to his own use. 4. That the prisoner intended when he picked up the note in the shop, to take it to his own use, and deprive the owner of it, whoever the owner might be. 5. That the prisoner believed, at the time he picked up the note, that the owner could be found." Now, if this was a case of lost property strictly, there was, pretty plainly, no larceny within the doctrines above laid down; and, *a fortiori*,

by inquiry, the party finding the thing, and appropriating it to his own use, is guilty of larceny. [See Rex *v.* Wynne, 1 Leach, 4th ed. 413, 2 East P. C. 664, 697; Rex *v.* Sears, 1 Leach, 4th ed. 415, note; Lamb's Case, 2 East P. C. 664; Roscoe Crim. Ev. 592.] So, if it is found in a street, and there is any mark by which the owner can be discovered. So, in the case where a gold ornament is found at the door of a house, it is ridiculous to say that any person picking it up would not suppose that it belonged to the owner of the house. . . . If he took it up, and did not immediately bring it to the prosecutor, in the hopes, that, by coming next day, he would get a present of £5, perhaps it might not amount to a larceny. If he took it away with the intention to appropriate it, and only restored it because the reward was offered, it is clear that he is guilty of felony." In Reg. *v.* Christopher, Bell C. C. 27, 34, 8 Cox C. C. 91, the doctrine was laid down by Hill, J., thus: "Two things must be made out in order to establish a charge of larceny against the finder of a lost article. First, it must be shown, that, at the time of finding, he had the felonious intent to appropriate the thing to his own use. . . . The other ingredient necessary is, that, at the time of finding, he had reasonable ground for believing that the owner might be discovered; and that reasonable belief may be the result of a previous knowledge, or may arise from the nature of the chattel found, or from there being some name or mark upon it; but it is not sufficient that the finder may think that by taking pains the owner *may* be found, — there must be the *immediate* means of finding him."

[1] See particularly on this point, Reg. *v.* Dixon, and People *v.* Cogdell, supra; The State *v.* Dean, 49 Iowa, 73.

there was none if the case was one of abandoned goods. If, on the other hand, the bank-note was to be regarded as not lost, plainly there was a larceny. The judges, however, seemed to regard this case neither as strictly of the one class, nor strictly of the other; yet they held, that the prisoner was properly convicted of the larceny of the note.[1]

Taking by one employed to find. — In North Carolina, a person who had lost a carpet-bag in the street employed another to find it. The latter found and concealed it, but he was held not to be guilty of larceny.[2]

VIII. *Remaining and Connected Questions.*

§ 884. **Grand — Principal of Second Degree.** — The distinction between grand and petit larceny appears in other connections.[3] "If two steal goods above the value of 12*d.* from the same person at the same time, this is grand larceny in both; for it is one entire felony, and both are guilty of the whole."[4]

§ 885. **Felony.** — This offence is felony.[5]

Principal and Accessory — Receiving. — Therefore the doctrine of principals[6] and of accessories[7] before[8] and after[9] the fact must be attended to; but these particulars were examined in the former volume. We shall devote a subsequent brief chapter in this volume to the law of receiving stolen goods.[10]

Punishment. — The punishment, also, which is chiefly of statutory regulation, has already been considered, in respect of its general principles.[11]

[1] Reg. *v.* Moore, Leigh & C. 1, 8 Cox C. C. 416. Cockburn, C. J., said of the note: "It was lost in the sense that it had been dropped out of the owner's purse; it was not lost in the sense that the owner did not know where to find it. As soon as the owner discovers his loss, he goes at once to the shop and inquires for it." And he added: "If this were not larceny, our law would be much more defective than I take it to be." p. 8 of the report in Leigh & C.

[2] The State *v.* England, 8 Jones, N. C. 399.

[3] Vol. I. § 679, 680. See ante, § 757.

[4] 2 East P. C. 740; 1 Hawk. P. C. 6th ed. c. 33, § 32.

[5] Vol. I. § 679, 680. **Cow-stealing.** — Cow-stealing, under the South Carolina statute, is misdemeanor. Burton *v.* Watkins, 2 Hill, S. C. 674; The State *v.* Hamblin, 4 S. C. 1. But see The State *v.* Ripley, 2 Brev. 300. It is punished by fine and imprisonment. The State *v.* Hamblin, supra. And see Stat. Crimes, § 173, 174.

[6] Vol. I. § 646–654.

[7] Vol. I. § 662–671.

[8] Vol. I. § 672–680.

[9] Vol. I. § 692–700.

[10] Post, § 1137 et seq.

[11] Vol. I. § 927 et seq. And see ante, § 55. As to various States, see Swinney *v.* The State, 8 Sm. & M. 576; Wilcox

§ 886. **Attempts.** — The doctrine of solicitations[1] and other attempts[2] to commit larceny was also discussed in the preceding volume.

§ 887. **Misprisions — (Treasure-trove).** — Likewise the doctrine of misprision was discussed in the first volume.[3] Blackstone mentions, among what he calls negative misprisions, "the concealing of treasure-trove,[4] which belongs to the king or his grantees by prerogative royal; the concealment of which was formerly punishable by death, but now only by fine and imprisonment."[5]

§ 888. **The Transaction how divisible.**[6] — It is quite possible for a man, in many circumstances, to commit more crimes than one in a single transaction.[7] Can he do it by a single impulse? Under some circumstances he can: as, if he discharges a loaded gun at one whom he means to kill, but accidentally the ball passes by this one and takes the life of another, he has murdered the latter, and made an assault on the former with the intent to kill him, by a single touch of the trigger of the gun. If he is tried for the murder, can he then be proceeded against for the felonious assault, or are the two crimes so far one that a conviction or acquittal of either will be a bar to an indictment for the other? This is a different question, upon which it is not certain the authorities are agreed. So, coming to the subject of this chapter, it is in some circumstances plain and in others doubtful, whether more larcenies than one have been committed in a single transaction, or what is the effect of a jeopardy, upon an indictment for a part, on an indictment for the residue. Let us, therefore, look at —

What has been held. — It is plain doctrine, followed in all our courts, that, if in a single transaction more articles than one belonging to the same owner are stolen, the indictment may charge the larceny of the whole in one count. Indeed, it is but

v. The State, 3 Heisk. 110; Tucker *v.* The State, 3 Heisk. 484; Commonwealth *v.* McKenney, 9 Gray, 114; Watkins *v.* The State, 14 Md. 412; Cornish *v.* The State, 15 Md. 208; The State *v.* Gray, 14 Rich. 174.

[1] Vol. I. § 767.

[2] Vol. I. § 741, 743, 744; Reg. *v.* Sutton, 8 Car. & P. 291, 2 Moody, 29, 2 Lewin, 272; Corneille *v.* The State, 16 Ind. 232; Wolf *v.* The State, 41 Ala. 412; Lovett *v.* The State, 19 Texas, 174; Reg. *v.* Cheesman, Leigh & C. 140, 9 Cox C. C. 100; Commonwealth *v.* Taggert, 3 Brews. 340; Berdeaux *v.* Davis, 58 Ala. 611; The State *v.* Utley, 82 N. C. 556; De Lacy *v.* The State, 8 Baxter, 401.

[3] Vol. I. § 717–722.

[4] As to treasure-trove, see ante, § 875, 876.

[5] 4 Bl. Com. 121.

[6] Vol. I. § 791 et seq.

[7] Vol. I. § 778, 1060–1064.

one larceny.[1] And, though the articles should have different owners, it is, at least, permissible to charge the larceny of them in the same way.[2] But, of course, whether there is a single owner or the owners are numerous, the indictment need not, unless the prosecuting power chooses, embrace all the articles stolen; and, if it charges the larceny of those only which belong to a particular person, it is the doctrine of some of the courts that another indictment may be maintained for those which are another person's.[3] Other courts hold, that whether there were more larcenies than one depends on whether there was more than one taking, and not on the number of articles stolen or their ownership;[4] and, if there was but one taking, there can be only one conviction.[5]

§ 889. **Continued.** — Though the articles are not taken and carried away together, yet, if the taking is one continuous transaction, the larceny is one.[6] Where the prisoner, having taken an

[1] The State *v.* Snyder, 50 N. H. 150; following The State *v.* Cameron, 40 Vt. 555; and overruling The State *v.* Nelson, 8 N. H. 163. S. P. The State *v.* Williams, 10 Humph. 101; Quitzow *v.* The State, 1 Texas Ap. 47; The State *v.* McCormack, 8 Oregon, 236; Kelly *v.* The State, 7 Baxter, 323; The State *v.* Faulkner, 32 La. An. 725.

[2] Lorton *v.* The State, 7 Misso. 55; The State *v.* Daniels, 32 Misso. 558; The State *v.* Morphin, 37 Misso. 373; Reg. *v.* Bleasdale, 2 Car. & K. 765; post, § 889; 2 Stark. Plead. 2d ed. 449 and note; The State *v.* Newton, 42 Vt. 537; The State *v.* Merrill, 44 N. H. 624; The State *v.* Lambert, 9 Nev. 321; Commonwealth *v.* Sullivan, 104 Mass. 552; The State *v.* Hennessey, 23 Ohio State, 339; Wilson *v.* The State, 45 Texas, 76; Hudson *v.* The State, 9 Texas Ap. 151; Addison *v.* The State, 3 Texas Ap. 40. This doctrine is denied in a Tennessee case, which holds, that a count charging the larceny of property of A and property of B is double, and therefore to be quashed. There were deemed to be as many distinct offences as owners of things stolen. "Every larceny," said the learned judge, "includes a trespass to the person or property of the owner of the thing stolen. A larceny of the property of O'Brien was no trespass to the person or property of Corbitt, and *vice versa*." Morton *v.* The State, 1 Lea, 498, 499. This reasoning overlooks the fact, that the accusation does not come from the private persons trespassed upon, but from the State, and the names of these persons are given simply as descriptive of the one act of trespass whereof the State complains. An assault is a trespass; but, where by one act two persons are thus trespassed upon, an indictment is good and not double which in one count sets out this trespass according to the fact. Crim. Proced. II. § 60.

[3] The State *v.* Thurston, 2 McMul. 382; Reg. *v.* Brettel, Car. & M. 609; Commonwealth *v.* Sullivan, 104 Mass. 552; The State *v.* Lambert, 9 Nev. 321.

[4] The State *v.* Newton, 42 Vt. 537. And see The State *v.* Hennessey, 23 Ohio State, 339; Scarver *v.* The State, 53 Missis. 407.

[5] The State *v.* Morphin, 37 Misso. 373, and the other Missouri cases, and some from other States, cited supra. See also Bell *v.* The State, 42 Ind. 335; People *v.* Connor, 17 Cal. 354; Reg. *v.* Knight, Leigh & C. 378, 9 Cox C. C. 437; Hozier *v.* The State, 6 Texas Ap. 542; The State *v.* Augustine, 29 La. An. 119

[6] The State *v.* Trexler, 2 Car. Law Repos. 90; Rex *v.* Jones, 4 Car. & P. 217; The State *v.* Martin, 82 N. C. 672.

article, came back in about two minutes for a second, and in half an hour for a third, and the indictment was for stealing the three, Littledale, J., ruled that the carrying away of the first two articles might be regarded as one transaction, but that the larceny of the third was a separate offence; the period of half an hour being too long an interval to consider the act as continuing.[1] Plainly, however, such a question is not to be determined by the number of minutes or hours intervening, but by the nature of the transaction and the special facts. Where one was indicted for stealing coal, by working, for a series of years, through the help of innocent agents, a mine which extended into the lands of many different proprietors, — Erle, J., intimated that this was but one transaction, though he did not absolutely so direct, and said: "I should say, that, as long as coal was gotten from one shaft, it was one continuous taking, though the working was carried on by means of different levels and cuttings, and into the lands of different people."[2]

§ 890. **Local.** — That this offence, like all others, is local, so that the offender can be pursued only in the county of its commission,[3] is explained in "Criminal Procedure."[4]

Goods stolen in Foreign Jurisdiction. — In the first volume of this work, are discussed the principles by which to determine the indictability of the transaction where goods are stolen under a foreign jurisdiction and brought by the thief into our own.[5]

§ 891. **United States Bank Bills.** — The larceny of United States bank notes may be punished under State statutes.[6]

[1] Rex *v.* Birdseye, 4 Car. & P. 386.
[2] Reg. *v.* Bleasdale, 2 Car. & K. 765. See ante, § 431.
[3] Coon *v.* The State, 13 Sm. & M. 246.
[4] See Crim. Proced. I. § 45 et seq.
[5] Vol. I. § 136–143.
[6] The State *v.* Banks, Phillips, 577; Sallie *v.* The State, 39 Ala. 691.

CHAPTER XXVI.

LARCENY, COMPOUND.[1]

§ 892–894. Introduction.
895–899. Larcenies from the Person.
900–904. Larcenies from Particular Places.

§ 892. **How defined.** — A compound larceny is larceny aggravated by some attendant fact, increasing its enormity; the compound consisting of the larceny and the aggravating fact. It may be a —

Common-law Compound. — A familiar compound, known to the common law, is Robbery, to be treated of in a chapter further on. It consists mainly of larceny and assault.[2] A less pure compound is Burglary, already treated of; one of the ingredients of which is larceny, actual or attempted, or some other felony.[3] Or the aggravated larceny may be a —

§ 893. **Statutory Compound.** — The statutes on this subject are numerous; but, in one respect, they are alike. They require, for the constitution of the offence, first, a complete simple larceny; secondly, the particular aggravating matter which the statute points out. What we are to look at, therefore, in this chapter, concerns simply the aggravations.

§ 894. **How the Chapter divided.** — We shall consider, I. Larcenies from the Person; II. Larcenies from Particular Places.

I. *Larcenies from the Person.*

§ 895. *Private:* —

Stat. 8 Eliz. — The foundation statute respecting larcenies from the person is 8 Eliz. c. 4, § 2. It deprived of clergy those convicted of the "felonious taking of any money, goods, or chattels

[1] For matter relating to this title, see Vol. I. § 440, 566. See this volume, LARCENY; BURGLARY; ROBBERY. For the pleading, practice, and evidence, see Crim. Proced. II. § 771 et seq.

[2] Vol. I. § 438, 566, 582, 1063; post, ROBBERY.

[3] Ante, § 111, 117.

from the person of any other, privily without his knowledge, in any place whatsoever."[1]

Not extend to Petit. — "But then," says Blackstone, "it must be such a larceny as stands in need of the benefit of clergy; namely, of above the value of twelve pence; or else the offender shall not have judgment of death. For the statute creates no new offence; but only prevents the prisoner from praying the benefit of clergy, and leaves him to the regular judgment of the ancient law."[2]

How far Common Law with us. — There were indictments under this statute in colonial times in Maryland,[3] and probably in other of the colonies. But benefit of clergy having been abolished in our States,[4] and special provisions made for the punishment of felonies as well as misdemeanors, this old enactment is no longer of practical force. Yet the interpretations given it by the English tribunals may enlighten our own, in expounding similar words in our legislative acts.

§ 896. **"Privily without his Knowledge."** — The words "privily without his knowledge" exclude the idea of open violence;[5] therefore a robbery is not within this statute.[6] Neither is an open larceny, without violence;[7] and, "in Brown's Case, where the prisoner took the prosecutor's watch out of his pocket while sleeping, but who was thereby awakened just at the instant, and caught at his watch, but missed it, Hotham, B., with the advice of Aston, J., left it to the jury, whether, under the circumstances of the case, they would acquit the prisoner of *privately* stealing, &c., and find him guilty of simple larceny; as it could not be well said to be *privately* stealing where the prosecutor had seen part of the fact."[8] On principle, however, if there was enough done, unknown to the prosecutor, legally to constitute a larceny, though there was done also, within his knowledge, something else which might be deemed a part of the same offence or not, this is sufficient; leaving the question still open, whether it is not suffi-

[1] For a fuller recital and an exposition of this statute, see 2 East P. C. 700.

[2] 4 Bl. Com. 241. And see 2 East P. C. 701.

[3] Kilty Report of Statutes, 168.

[4] Vol. I. § 938.

[5] Stat. Crimes, § 222.

[6] 2 East P. C. 703. The words of the present English statute, differing from these, are "Whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony," &c. Stat. 24 & 25 Vict. c. 96, § 40.

[7] Ib.

[8] Brown's Case, 2 East P. C. 702. And see other cases referred to by Mr East in the same connection.

cient if the thing privately done is simply a necessary ingredient in any part of the crime.[1]

§ 897. **On Person drunk, &c.** — If one is so drunk, or otherwise so incapacitated, as not to be capable of knowing what is done, can private larceny be committed on him, especially in a place not private? Mr. East says: "It was formerly holden, that persons asleep or drunk were not within the protection of the act, which speaks [in the preamble] of places of public resort and the like, where persons were supposed to use ordinary caution, and not expose themselves by carelessness or misbehavior to these accidents."[2] The doctrine finally settled appears to be, that, if the incapacity were brought about by any artifice of the thief, his case is within the statute;[3] while, if it came through the fault of the prosecutor (as where he becomes drunk voluntarily,[4] or even possibly through such carelessness as accidentally falling asleep),[5] the consequence is otherwise. Where there was neither fault nor carelessness in either the thief or the prosecutor, but the latter was asleep of necessity, a stealing from him was held to be within the statute.[6]

Superseded. — But this statute of Elizabeth has been superseded in England by later enactments against larceny from the person generally, omitting the words "privily," &c.; and most of the American statutes follow the modern English form.[7]

§ 898. *Not Private:* —

"**From the Person.**" — A common form of the statutory inhibition is that adopted in Massachusetts; namely, "larceny by stealing from the person of another." To constitute this offence, the taking need not be either open and violent, or private and fraudulent; if it is with the knowledge of the owner, though without his dissent or resistance, it satisfies equally the requirements of the statute.[8] Snatching a thing from the hand is sufficient.[9] And

[1] See Vol. I. § 649, 650; 2 East P. C. 701, 702; Woodard *v.* The State, 9 Texas Ap. 412.

[2] 2 East P. C. 703.

[3] Rex *v.* Branny, 2 East P. C. 704, 1 Leach, 4th ed. 241, note.

[4] Rex *v.* Gribble, 1 Leach, 4th ed. 240, 2 East P. C. 706; Rex *v.* Kennedy, 2 Leach, 4th ed. 788, 2 East P. C. 706.

[5] Rex *v.* Thompson, 1 Leach, 4th ed. 443, 2 East P. C. 705. But see Rex *v.* Willan, 1 Leach, 4th ed. 495, 2 East P. C. 705. Contra, Reading's Case, 1 Leach, 4th ed. 240, note.

[6] Huckley's Case, 2 Leach, 4th ed. 789, note; Rex *v.* Willan, 1 Leach, 4th ed. 495, 2 East P. C. 705.

[7] See ante, § 896, note.

[8] Commonwealth *v.* Dimond, 3 Cush. 235. And see De Gaultie *v.* The State, 31 Texas, 32. It makes no difference that the person plundered was asleep. Hall *v.* People, 39 Mich. 717. See, as to the punishment, Commonwealth *v.* Nolan, 5 Cush. 288.

[9] Reg. *v.* Walls, 2 Car. & K. 214.

where the prisoner, at a railroad depot, took a bank-bill from the fingers of the prosecutor, who neither consented nor resisted, saying he would get for him his ticket, and then disappeared, — the court held that this statutory offence was committed.[1]

Protection of the Person. — The thing taken need not be actually attached to the person, but must be under its protection.[2] Probably the same rule applies here as in robbery.[3] It has been deemed, that, while a lodger is in his bed undressed and asleep, money in his trunk and the key of it in his pocket are under the protection, not of his person, but the house; and a stealing of them is larceny from the building, not the person.[4]

§ 899. **Asportation.** — In this sort of larceny, as in simple, there must be an asportation;[5] and there is an English case in which the majority of the judges considered, that lifting the article half way out of the pocket is too slight a severance from the person, though it would do in simple larceny.[6] But in Texas this was held to be sufficient in larceny from the person.[7] And, in England, where a watch, which the prisoner had drawn out, was immediately attached by the key to the prosecutor's button, there was deemed to be a severance from the person, as well as an asportation.[8]

II. *Larcenies from Particular Places.*

§ 900. **Under old Common Law.** — Under the common law of England, larcenies from dwelling-houses, shops, and the like, are mere simple larcenies; unless attended with a breaking of the habitation at night, when, as already explained,[9] they constitute a part of the crime of burglary.[10]

Old English Statutes. — But there are many old English statutes,

[1] Commonwealth *v.* Dimond, supra.

[2] Reg. *v.* Selway, 8 Cox C. C. 235.

[3] Post, § 1177, 1178.

[4] Commonwealth *v.* Smith, 111 Mass. 429. And see Reg. *v.* Hamilton, 8 Car. & P. 49, where, after a man had gone to bed with a prostitute, and had fallen asleep, leaving his watch in his hat on the table, a larceny of the watch by her was held not to be from his person. See also Rex *v.* Thomas, Car. Crim. Law, 3d ed. 295.

[5] Ante, § 893.

[6] Rex *v.* Thompson, 1 Moody, 78. See ante, §. 794, 795, and note.

[7] Flynn *v.* The State, 42 Texas, 301.

[8] Reg. *v.* Simpson, Dears. 421, 18 Jur. 1030, 29 Eng. L. & Eq. 530. As to Larceny "from the possession," see Rex *v.* Robinson, 2 Stark. 485. And see Rex *v.* Thomas, 2 East P. C. 605, 2 Leach, 4th ed. 634.

[9] Ante, § 111, 117, 892.

[10] 2 East P. C. 623; 4 Bl. Com. 239, 240.

some of which are early enough in date to be common law in this country,[1] whereby the benefit of clergy is taken away from theft committed in such places, under particular circumstances which the statutes specify.[2] Yet, as already explained,[3] such statutes have little or no practical operation when the plea of benefit of clergy is abolished; while the judicial interpretations of them may be important guides to the meaning of like terms in the legislation of the State.[4]

§ 901. **From "Dwelling-house" or "House."** — Among the more common of the modern statutory provisions, are those which make it specially punishable to steal from a "dwelling-house," or a "house." What is a "*dwelling-house*,"[5] and what a "*house*,"[6] are explained in other connections. And in "Statutory Crimes" the law of larceny and robbery from houses and dwelling-houses is perhaps sufficiently stated.[7] A reference to some cases in the note will be convenient.[8]

From "Shop," &c. — But the words to designate the place are numerous. The meaning of "*shop*"[9] is given in "Statutory Crimes;" so likewise are the meanings of most of the other terms.

[1] In a Georgia case, the court observed: "Every difficulty might be obviated by an indictment under the Stat. 12 Anne, for stealing to the value of forty shillings in a dwelling-house, computing the value of the goods according to American calculation. That statute, as far as it can operate, is in force in this State, because it is not in hostility with any similar section of the penal code, there being no section providing for the offence of larceny from the dwelling-house. The penal code of Georgia does not abrogate all the criminal law of England in force anterior to its passage, but leaves it as it was, with a restriction only as to any punishment which may be incompatible with the nature and purposes of a penitentiary system." The State *v.* Maloney, R. M. Charl. 84, Charlton, J.

[2] For an enumeration of them, see 4 Bl. Com. 240; 2 East P. C. 623 et seq.

[3] Ante, § 895.

[4] In Commonwealth *v.* Hartnett, 3 Gray, 450, 451, Metcalf, J., observed: "We do not suppose that any English statutes for the punishment of larceny were ever held to be in force in Massachusetts. Yet the provisions of some of them, and the provisions of acts of Parliament for the punishment of other offences, have been enacted by our legislature, in every stage of our history. And in such cases (as well as in cases where English statutes respecting civil concerns have been enacted here), it has always been held, that the construction previously given to the same terms by the English courts is the construction to be given to them by our courts."

[5] Stat. Crimes, § 277 et seq.; Rex *v.* Turner, 6 Car. & P. 407; ante, § 104.

[6] Stat. Crimes, § 213, 277, 289; ante, § 11.

[7] Stat. Crimes, § 233, 234, 240, 525.

[8] Point *v.* The State, 37 Ala. 148; Taylor *v.* The State, 42 Texas, 387; Callahan *v.* The State, 41 Texas, 43; Wakefield *v.* The State, 41 Texas, 556; Williams *v.* The State, 41 Texas, 649; Reg *v* Murphy, 6 Cox C. C. 340.

[9] Stat. Crimes, § 295; Commonwealth *v.* Annis, 15 Gray, 197.

§ 902. **Goods under Protection of Place, &c.** — But the matter which is the most important is the proposition, illustrated in "Statutory Crimes,"[1] that these statutes apply only to things usually kept in the place wherein the larceny is by them made specially penal, and kept under the protection of this place, and to persons who are within the spirit of their provisions.[2] We have seen[3] that, if one going to bed puts his clothes and money by the bedside, they are under the protection of the dwelling-house, and not of the person; therefore the stealing of them is larceny in the dwelling-house.[4]

§ 903. **Wife.** — We have seen,[5] that a wife cannot commit simple larceny by stealing her husband's goods. In like manner, if she steals the goods of a third person, she does not add to this simple larceny the ingredient of taking them "in any building" when she takes them in a building owned by her husband. This is in accordance with the construction which, in England, was given to Stat. 12 Anne, stat. 1, c. 7, as explained in the work on Statutory Crimes.[6] And though the statutory words have been in this country changed, it is judicially decided that the ancient interpretation should still be followed.[7]

§ 904. **Other Compound Larcenies.** — There are various other compound larcenies; perhaps the most important of which are those, created by national statutes, for the protection of the mails.[8]

[1] Stat. Crimes, § 233.

[2] Williams *v.* The State, 41 Texas, 649; Wakefield *v.* The State, 41 Texas, 556; Taylor *v.* The State, 41 Texas, 387; Point *v.* The State, 37 Ala. 148; Martinez *v.* The State, 41 Texas, 126; Henry *v.* The State, 39 Ala. 679.

[3] Ante, § 898.

[4] Rex *v.* Thomas, Car. Crim. Law, 3d ed. 295; Reg. *v.* Hamilton, 8 Car. & P. 49. As to larceny from a coach, see Sharpe's Case, 2 Lewin, 233.

[5] Ante, § 872.

[6] Stat. Crimes, § 233.

[7] Commonwealth *v.* Hartnett, 3 Gray, 450; ante, § 900, note.

[8] *Postal Offences.* — 1. In the Revised Statutes of the United States, p. 1064–1068, § 5463–5480, the reader will find these and kindred offences set down under the larger title of "Postal Crimes." It would be useless to repeat the provisions here, but a brief statement of legal doctrines and the citation of some authorities may be helpful to the reader. Among the words used in these statutes is —

2. "Secrete." — Thus, "any person employed in any department of the postal service who shall *secrete*, embezzle, or destroy any letter," &c. R. S. of U. S. § 5467. For cases expounding this word "secrete," see The State *v.* Williams, 30 Maine, 484; Reg. *v.* Wynn, 1 Den. C. C. 365, Temp. & M. 32, 2 Car. & K. 859, 3 New Sess. Cas. 414, 13 Jur. 107. There is an English statute not dissimilar to ours; and, under it, a stamper at the post-office who purloins a letter merely to deliver it as a missorted letter, and thus obtain the postage of it, does not "secrete" it, although containing money. The reason once given is, "that, as the statute extends to such letters only as

Stealing from Vessel. — In Massachusetts, stealing from a vessel in the night-time has been held to be a distinct offence from that of stealing from a vessel in the daytime.[1]

contain valuable documents, the security of the documents was the object contemplated by the legislature; and, as the prisoner had no intention to put those documents in hazard, or to prevent the person for whom they were intended from receiving them, the case, though within the letter, was not within the spirit of the act, and the conviction was therefore wrong." Rex *v.* Sharpe, 1 Moody, 125, Car. Crim. Law, 3d ed. 147. In harmony with this doctrine, it is also held, that, if a carrier takes from the post-office a letter, intending to deliver it to the owner, and, at the same time, to embezzle the postage, he does not commit larceny of the letter. Rex *v.* Howatt, 2 East P. C. 604, 1 Leach, 4th ed. 83, note.

3. "**Person employed in the Postal Service.**" — According to English decisions, a letter-carrier is such a person, even while executing, by direction of a postmaster, a commission not strictly within the ordinary line of his duty. Reg. *v.* Bickerstaff, 2 Car. & K. 761. And so is any one, not in the ordinary service, while gratuitously assisting a postmaster, at his request, in assorting letters. Reg. *v.* Reason, 22 Eng. L. & Eq. 602. But a man, engaged at a receiving house of the general post-office in cleaning boots, assisting in tying up the letter-bags, and the like, is not a servant of the post-office. Rex *v.* Pearson, 4 Car. & P. 572. As to the letter's coming into the prisoner's hands "in consequence of his employment," see Rex *v.* Salisbury, 5 Car. & P. 155. As to a letter-carrier, with us, see United States *v.* Parsons, 2 Blatch. 104.

4. "**Post-office.**" — A receiving house is not, in England, a "post-office," but "a place for the receipt of letters." Reg. *v.* Pearson, supra. With us, the term "post-office" would seem to embrace every place of deposit for letters, used in the regular business of the mail service. It need not be a building set apart for that use, or any apartment or room in it. According to the extent of the business done, it may be a desk, or trunk, or box carried about a house or from one building to another. United States *v.* Marselis, 2 Blatch. 108. And see United States *v.* Nott, 1 McLean, 499.

5. "**Post Letter.**" — These words are in the English statute; and, though not in ours, their equivalent is. Any letter, posted in the ordinary way, whatever be its address and object, is a post letter; as, for example, one to a fictitious name, put into the post-office to test the honesty of a clerk. Reg. *v.* Young, 1 Den. C. C. 194, 2 Car. & K. 466, overruling Reg. *v.* Gardner, 1 Car. & K. 628; S. P. United States *v.* Foye, 1 Curt. C. C. 364. And see Reg. *v.* Rogers, 5 Cox C. C. 293. But a letter not deposited in the ordinary way does not come within this designation. Therefore, when, on suspicion being entertained of a letter-carrier, an assistant inspector wrote and sealed a letter, enclosing in it a marked sovereign, and took an opportunity while the carrier's back was turned to place it among some letters which the latter was sorting, — this was held not to be a post letter; and, though the carrier stole it, with the sovereign, the judges decided that his offence was only a simple larceny of the money. Reg. *v.* Rathbone, 2 Moody, 242, Car. & M. 220. And see Reg. *v.* Harley, 1 Car. & K. 89; Reg. *v.* Shepherd, Dears. 606, 36 Eng. L. & Eq. 599. See also Reg. *v.* Bickerstaff, 2 Car. & K. 761. It is not important, except as aggravating the offence, that the letter should contain money. United States *v.* Fisher, 5 McLean, 23. The letter need not be sealed. United States *v.* Pond, 2 Curt. C. C. 265, where also various other points are stated. And see United States *v.* Tanner, 6 McLean, 128.

6. **Embezzlement and Larceny.** —

[1] Commonwealth *v.* McLaughlin, 11 Cush. 598.

Other Questions. — Help on other questions relating to compound larcenies will be found in "Statutory Crimes."[1]

For various cases of post-office embezzlement and larceny, see United States *v.* Marselis, 2 Blatch. 108; United States *v.* Parsons, 2 Blatch. 104; United States *v.* Keene, 5 McLean, 509; United States *v.* Pond, 2 Curt. C. C. 265; United States *v.* Driscoll, 1 Lowell, 303; United States *v.* Emerson, 6 McLean, 406; Rex *v.* Brown, Russ. & Ry. 32, note; United States *v.* Hardyman, 13 Pet. 176; Rex *v.* Ranson, Russ. & Ry. 232, 2 Leach, 4th ed. 1090.

7. **The Tribunal — Not Felony.** — These post-office offences are punishable only in the United States tribunals; and are not, like larcenies at the common law, felonies. United States *v.* Lancaster, 2 McLean, 431.

[1] And see for various points: Devoe *v.* Commonwealth, 3 Met. 316; Commonwealth *v.* Tuck, 20 Pick. 356; Hopkins *v.* Commonwealth, 3 Met. 460. In Missouri, stealing in a dwelling-house is grand larceny, without regard to the value of the property stolen; and it may be punished as such under art. 3, § 32, of the act concerning crimes and punishments. The State *v.* Ramelsburg, 30 Misso. 26; The State *v.* Smith, 30 Misso. 114. See, as to the Alabama statutes, Case *v.* The State, 26 Ala. 17.

For LEWDNESS, see OPEN AND NOTORIOUS LEWDNESS, in Stat. Crimes. And see Vol. I. § 500, 1083 et seq., 1125 et seq.

CHAPTER XXVII.

LIBEL AND SLANDER.[1]

§ 905, 906. Introduction.
907–927. Definition and Nature of Libel.
928–944. Different Kinds of Libel.
945–947. Verbal Slander.
948, 949. Remaining and Connected Questions.

§ 905. **Common-law Offence.** — Libel is an offence under the common law both of England and of our States.[2] Verbal slander is indictable only in rare circumstances.

Civil Action. — For each, a civil action may, within recognized limits, be maintained.

§ 906. **What for this Chapter — How divided.** — If we should compare closely the civil suit and the criminal, we should discover places at which the two would seem to proceed on principles nearly if not quite identical; while, at other places, they would be wide apart. It will not compensate us to undertake the comparison throughout, yet occasionally we may advert to what is held by the civil courts. We shall consider, I. The Definition and Nature of Libel; II. The Different Kinds of Libel; III. Verbal Slander; IV. Remaining and Connected Questions.

I. *The Definition and Nature of Libel.*

§ 907. **Classed with Attempt.** — The offence of libel is founded on the doctrine of attempt.[3]

How defined. — It is any representation in writing,[4] or by pict-

[1] For matter relating to this title, see Vol. I. § 110, 204, 219–221, 308, 319, 470, 484, 500, 540, 591, 734, 761, 799, 917. See, in this volume, BLASPHEMY AND PROFANENESS. Also, NUISANCE, Vol. I. § 1071 et seq., with some of the succeeding chapters. For the pleading, practice, and evidence, see Crim. Proced. II. § 781 et seq. And see Stat. Crimes, § 388–392.

[2] Commonwealth *v.* Holmes, 17 Mass. 336; Commonwealth *v.* Chapman, 13 Met. 68; The State *v.* Burnham, 9 N. H. 34.

[3] Vol. I. § 734. As to attempts generally, see Vol. I. § 723 et seq.

[4] Ante, § 525 et seq.

ures, effigies,[1] or the like, calculated to create disturbances of the peace, to corrupt the public morals, or to lead to any act which, when done, is indictable.[2]

§ 908. **Other Definitions.** — Starkie says: "The offence may consist in the tendency of the communication to weaken or dissolve religious or moral restraints, or to alienate men's minds from the established constitution of the state, or to engender hatred and contempt of the king or his government, or the houses of Parliament, or the administration of public justice, or in general to produce some particular inconvenience or mischief, or to excite individuals to the commission of breaches of the public peace, or other illegal acts."[3]

Concerning our own Definition. — Our own definition above, especially in the last clause of it,[4] is expressed in terms somewhat broader than are usually employed in the books; but it is believed to be sustained by the current of decision, as well as by the true reasons of the law of this offence.

Mischiefs. — Some of the mischiefs, the tendency to which renders the writing libellous, are the following: —

§ 909. First. **Breaches of the Peace.** — The common tendency, to which the books oftener allude than any other, is to create breaches of the peace. This is said to be the principal ground on which libels against individuals are indictable.[5]

[1] 1 Hawk. P. C. Curw. ed. p. 542, § 2, 3; Case de Libellis Famosis, 5 Co. 125 *a*.

[2] And see Commonwealth *v.* Clap, 4 Mass. 163, 168, 169; Steele *v.* Southwick, 9 Johns. 214; The State *v.* Farley, 4 McCord, 317; Case de Libellis Famosis, 5 Co. 125 *a*.

[3] 2 Stark. Slander, 130. **Defined in Delaware.** — We find in the books various definitions of libel; but the following, from the Delaware court, copied to a considerable extent from other sources, is not an uncommon form: "A libel is a *miscellaneous* [malicious] publication in printing, writing, signs, or pictures, imputing to another something which has a tendency to injure his reputation, to disgrace or to degrade him in society and lower him in the esteem and the opinion of the world, or to bring him into public hatred, contempt, or ridicule." The State *v.* Jeandell, 5 Harring. Del. 475. That the word "miscellaneous" is a misprint for "malicious," appears from the cases to which the court refers; namely, Layton *v.* Harris, 3 Harring. Del. 406, 407; Rice *v.* Simmons, 2 Harring. Del. 417, 431, 433. But this definition, the reader perceives, refers merely to libels on individuals, excluding the large and important class of public libels. Russell, after describing the various sorts of public libel, proceeds: **Defined by Russell.** — "With respect to libels upon individuals, they have been defined to be malicious defamations, expressed either in printing or writing, or by signs or pictures, tending either to blacken the memory of one who is dead, or the reputation of one who is alive, and thereby exposing him to public hatred, contempt, and ridicule." 1 Russ. Crimes, 3d Eng. ed. 220.

[4] See post, § 912.

[5] Vol. I. § 591; 2 Stark. Slander, 211, 212; Commonwealth *v.* Clap, 4 Mass.

§ 910. Secondly. **Corruption of the Public Morals.** — This is another frequent ground of indictability. On it rests the entire class of what are called obscene libels;[1] and, in a degree, blasphemy and profaneness.[2]

§ 911. Thirdly. **Discontent toward the Government.** — Under this head we have all those publications which, coming short of actual treason, tend to create disaffection toward the form of government under which we live, or toward its administration and its laws. These libels will be further considered in subsequent sections.[3]

§ 912. Fourthly. **Incite to other Violations of Criminal Law.** — In the first volume, was considered the doctrine that any solicitation to commit a criminal act is itself a crime. It is an attempt.[4] Now, in libel, the rule appears to be, though not fully illustrated by adjudication, that any publication which tends to excite people to the commission of any crime is a libel; being, by the law of libel, made a substantive offence, in distinction from being left to punishment as a mere criminal attempt. It seems also to have been regarded in this way by Starkie.[5]

§ 913. *The Limitations and Restrictions of these General Propositions:* —

How General Doctrines limited in Law. — Our unwritten law consists of doctrines general in form, scarcely any one of which is universal in its application. Doctrine limits doctrine. By one doctrine or a series of doctrines, rights may be recognized and privileges guaranteed. If another doctrine appears, it is to have a certain scope, but not to overturn what is thus established. Therefore, —

Liberty of Press. — It being fundamental with us that the proper and open discussion of whatever concerns the public shall be free, the law of libel is never to be so administered as to impair the just liberty of the press. Consequently, though a particular publication is such on its face as the general law of libel prohibits, yet, if a suppression of it would be a restraint upon that open discussion of proper subjects which is essential to the

163, 168, 169; Case de Libellis Famosis, 5 Co. 125 *a*.

[1] Vol. I. § 500.

[2] Ante, § 73 et seq.

[3] Post, § 941, 942.

[4] Vol. I. § 767, 768.

[5] 2 Stark. Slander, 207 et seq.

liberty of the people, or to any other public or even private right, it cannot be punished criminally.[1]

§ 914. **Duty to speak.** — Not only the liberty of the press must be preserved, but the liberty of written discourse, as well as of oral, in all other relations where there is a duty to speak, whether the duty is due to the person speaking, to the person addressed, or to the public. If what is written, under such a duty, goes no further than duty demands, it is not indictable or actionable, unless express malice is shown; otherwise if it goes beyond the line of duty.[2] Thus, —

In Discipline — Remonstrance — Criticism — Advertising for Information. — If, in good faith, a member of an Odd Fellows' society,[3] or of a church,[4] or of a Quaker meeting,[5] prefers, entertains, or prosecutes charges against another member, in the course of the discipline established by the rules, whether written or otherwise understood, of the body in which the discipline is carried on; or, if a member of a school district writes in good faith a letter remonstrating against the appointment of a particular candidate as a teacher;[6] or, if any person criticises a literary production or work of art, publicly put forth;[7] or, if one, interested in acquiring any particular information, advertises for it;[8] — in these cases, and all others resting on the like reason, the man making the publication, without malice in his heart, is not to be holden for a libel, even though it contains matter, false in fact, of a nature injurious to another individual.[9] Of course, if he follows this apparent duty as a cloak to conceal actual malice, the result is otherwise. The publications described in this section are called in the law privileged.

[1] This doctrine comes rather from the cases generally, and the reasons of the law, than from express decision. And see Reg. *v.* Marshall, 2 Jur. 254; Rex *v.* Burdett, 4 B. & Ald. 95, 132; New York Juvenile Guardian Soc. *v.* Roosevelt, 7 Daly, 188; Morton *v.* The State, 3 Texas Ap. 510.

[2] The State *v.* Burnham, 9 N. H. 34; Bradley *v.* Heath, 12 Pick. 163; Gassett *v.* Gilbert, 6 Gray, 94; Gilbert *v.* People, 1 Denio, 41; Commonwealth *v.* Featherston, 9 Philad. 594; Williamson *v.* Freer, Law Rep. 9 C. P. 393; Robinett *v.* Ruby, 13 Md. 95; Philadelphia, &c. Railroad *v.* Quigley, 21 How. U. S. 202; Davison *v.* Duncan, 7 Ellis & B. 229; Liddle *v.* Hodges, 2 Bosw. 537; Clark *v.* Molyneux, 3 Q. B. D. 237; Jacob *v.* Lawrence, 14 Cox C. C. 321; 1 Hawk. P. C. Curw. ed. p. 544, § 8.

[3] Streety *v.* Wood, 15 Barb. 105.

[4] Remington *v.* Congdon, 2 Pick. 310.

[5] Rex *v.* Hart, 1 W. Bl. 386.

[6] Bodwell *v.* Osgood, 3 Pick. 379.

[7] 1 Stark. Slander, 305–314; Thompson *v.* Shackell, Moody & M. 187; Green *v.* Chapman, 5 Scott, 340, 4 Bing. N. C. 92.

[8] Delany *v.* Jones, 4 Esp. 191.

[9] Vol. I. § 308.

§ 915. **Petition to Legislature.** — According to Hawkins, "no false or scandalous matter contained in a petition to a committee of Parliament" is indictable as a libel.[1]

Proceedings in Court. — He adds, that the same is true of the like matter "in articles of the peace exhibited to justices of peace, or in any other proceeding in a regular course of justice;" "for it would be a great discouragement to suitors to subject them to public prosecutions, in respect of their applications to a court of justice."[2]

Publishing Judicial Proceedings. — When a case has been finally disposed of, a correct publication of the proceedings is not generally libellous.[3] But if the report, though accurate, is accompanied by comments and insinuations to asperse a man's character,[4] or statements of the like sort not properly belonging to the proceedings,[5] such extraneous matter is indictable. It has been further laid down, that a correct account of judicial transactions cannot be published when it contains matter of a scandalous, blasphemous, or immoral tendency;[6] though it is otherwise when the matter is merely defamatory of an individual.[7]

Counsel. — Counsel are protected while they keep within what is material to the cause, but not when they overstep this bound.[8]

§ 916. **Ex parte and Preliminary.** — The publication of *ex parte* and preliminary proceedings stands on a somewhat different ground. "Where the evidence is *ex parte*," says Starkie, "the party charged has no means of establishing a defence, and such premature statements tend to excite undue prejudices against the accused, and to deprive him of the benefit of a fair and impartial trial; and, therefore, in several instances, the publication of matters of criminal charge, contained in depositions before magistrates, has been held to be indictable."[9] This doctrine has

[1] 1 Hawk. P. C. Curw. ed. p. 544, § 8; 1 Stark. Slander, 239 et seq.; Wason *v.* Walter, Law Rep. 4 Q. B. 73.

[2] Hawk. & Stark. ut supra.

[3] 1 Stark. Slander, 263; 1 Russ. Crimes, 3d Eng. ed. 225; Ryalls *v.* Leader, Law Rep. 1 Ex. 296; Milissich *v.* Lloyds, 13 Cox C. C. 575.

[4] Commonwealth *v.* Blanding, 3 Pick. 304; Thomas *v.* Crosswell, 7 Johns. 264, 272. See Clark *v.* Binney, 2 Pick. 113; Rex *v.* Fleet, 1 B. & Ald. 379.

[5] Delegal *v.* Highley, 5 Scott, 154, 3 Bing. N. C. 950; s. c. nom. Delegall *v.* Highley, 8 Car. & P. 444.

[6] Rex *v.* Carlile, 3 B. & Ald. 167; 1 Stark. Slander, 264; 1 Russ. Crimes, 3d Eng. ed. 226.

[7] Wason *v.* Walter, Law Rep. 4 Q. B. 73, and other authorities above.

[8] Gilbert *v.* People, 1 Denio, 41: McLaughlin *v.* Cowley, 127 Mass. 316.

[9] 1 Stark. Slander, 265; Rex *v.* Fisher, 2 Camp. 563; Rex *v.* Fleet, 1 B. & Ald. 379; Rex *v.* Lee, 5 Esp. 123. And see 1 Russ. Crimes, 3d Eng. ed. 227; Stiles *v.*

generally been understood to extend to all preliminary examinations before a magistrate, though not in the strict sense *ex parte*. But in a case before the Queen's Bench in Ireland, the court, one judge dissenting, refused to grant a criminal information against a newspaper proprietor for a fair and impartial publication of such proceedings, though they contained matter reflecting unfavorably on the accused persons. And the judges deemed that they were not compelled to a contrary course by the authorities,[1] which they considered somewhat conflicting. Yet they allowed an information to go for collateral reflections on the parties.[2] And the English doctrine is clearly so now.[3]

Publication contrary to Order of Court. — When a cause is being finally tried, the judge, we have seen,[4] sometimes forbids, by order of court, any publication of the proceedings while the trial is progressing, and a disobedience to his order is a contempt of court; clearly, therefore, the publisher in such a case could not shield himself from an indictment for libel, on the ground that the libel was but a correct report of what was done.[5]

§ 917. **Legislative Proceedings.** — The publication of legislative doings is protected substantially like that of the doings of judicial tribunals.[6] If an individual is aspersed in his character thereby, he is without remedy.[7]

Privilege of Members. — So also the members of legislative assemblies are not to be called in question for their official acts, or for words spoken in debate.[8] But if a member causes a speech, which contains libellous matter, to be published, he is not protected in respect of such publication: for the publishing of it is an act outside of his legislative duties.[9]

Nokes, 7 East, 493; Carr *v.* Jones, 3 Smith, 491.

[1] Besides cases mentioned in our last note, the following were cited: Duncan *v.* Thwaites, 3 B. & C. 566; cases collected in Hodge's report of Reg. *v.* O'Doherty and Martin at p. 220; Reg. *v.* Clement, 4 B. & Ald. 218; Lewis *v.* Levy, Ellis, B. & E. 537; Cox *v.* Feeney, 4 Fost. & F. 13.

[2] Reg. *v.* Gray, 10 Cox C. C. 184.

[3] Usill *v.* Hales, 3 C. P. D. 319.

[4] Ante, § 259.

[5] See also Rex *v.* Burdett, 1 Ld. Raym. 148; Rex *v.* Jolliffe, 4 T. R. 285; Reg. *v.* Marshall, 2 Jur. 254; Rex *v.* Gilham, Moody & M. 165; Graves *v.* The State, 9 Ala. 447.

[6] 1 Stark. Slander, 239 et seq.

[7] Wason *v.* Walter, Law Rep. 4 Q. B. 73.

[8] Stark. ut sup.; 1 Kent Com. 235, note; May Parl. Law, 2d ed. 98, 100; Coffin *v.* Coffin, 4 Mass. 1. See Vol. I. § 461, 462.

[9] 1 Kent Com. 235, note; Rex *v.* Creevey, 1 M. & S. 273; Rex *v.* Abingdon, 1 Esp. 226, Peake, 236. See Rex *v.* Williams, 2 Show. 471; Rex *v.* Wright, 8 T. R. 293; Coffin *v.* Coffin, 4 Mass. 1.

§ 918. **Truth in Evidence.** — Under the common law, it was immaterial whether the matter of a libel were true or false. Its effect on the public and individuals was supposed to be, and perhaps it is, the same in either case. Therefore, though no man can maintain a civil action for true words which another has written or spoken concerning him,[1] yet their truth is, at the common law, no defence to a criminal prosecution.[2] This proposition is usually laid down of libels on individuals; but, in principle, and probably in authority, it applies also to all other libels.[3] Yet, —

Written under Duty. — This rule cannot strictly extend to libels published under a duty to speak;[4] for, in such cases, the inquiry concerning the motive, as whether the act was in good faith or an intended slander, is proper; and the question of the truth or falsehood of what is said may be vital to this issue.[5] And, —

Truth in Mitigation of Punishment. — Under the proper circumstances, a convicted defendant may rely, in mitigation of punishment, on the fact that he believed the publication true, though he may not show it to be really true.[6]

Truth as to Criminal Information. — If the proceeding is by information, a court having the discretion to grant or withhold it, will generally refuse where the libel probably contained only the truth.[7]

[1] 1 Stark. Slander, 229 et seq.

[2] Vol. I. § 591; 2 Stark. Slander, 251; 1 Hawk. P. C. Curw. ed. p. 543, § 6; 1 Russ. Crimes, 3d Eng. ed. 222; The State *v.* Burnham, 9 N. H. 34; Commonwealth *v.* Clap, 4 Mass. 163, 169; Cropp *v.* Tilney, Holt, 422; Rex *v.* Burdett, 4 B. & Ald. 95, 3 B. & Ald. 717; The State *v.* Lehre, 2 Brev. 446, 2 Tread. 809; Commonwealth *v.* Blanding, 3 Pick. 304; Rex *v.* Dean St. Asaph, 3 T. R. 428, note; Rex *v.* Withers, 3 T. R. 428; Rex *v.* Shipley, 4 Doug. 73; Rex *v.* Draper, 3 Smith, 390; Rex *v.* Bickerton, 1 Stra. 498; Rex *v.* Dennison, Lofft, 148; Case de Libellis Famosis, 5 Co. 125 *a*. And see People *v.* Crosswell, 3 Johns. Cas. 336, 357; 2 Stark. Slander, 252, note to Am. ed. **Copied.** — On the same principle, it is no defence that the libel was copied from another publication. 1 Russ. Crimes, 3d Eng. ed. 223; Rex *v.* Holt, 5 T. R. 436; Commonwealth *v.* Snelling, 15 Pick. 337; Reg. *v.* Drake, Holt, 425; Rex *v.* Bear, 2 Salk. 417; Reg. *v.* Brown, 11 Mod. 86; Lamb's Case, 9 Co. 59 *b*, Sir F. Moore, 813. **Current Report.** — Of course, also, it is no defence that the libel merely echoes a current report or rumor, or otherwise repeats what some other person has said. The State *v.* White, 7 Ire. 180.

[3] And see 2 Stark. Slander, 255.

[4] See ante, § 914.

[5] Commonwealth *v.* Clap, 4 Mass. 163; Commonwealth *v.* Blanding, 3 Pick. 304, 314, 316, 317; Commonwealth *v.* Morris, 1 Va. Cas. 176; The State *v.* Burnham, 9 N. H. 34; post, § 937.

[6] Rex *v.* Halpin, 4 Man. & R. 8, 9 B. & C. 65; Rex *v.* Burdett, 4 B. & Ald. 314. And see Graves *v.* The State, 9 Ala. 447.

[7] Rex *v.* Bickerton, 1 Stra. 498; Rex *v.* Draper, 3 Smith, 390; Reg. *v.* Gregory, 1 Per. & D. 110, 8 A. & E. 907; Rex *v.*

§ 919. **Policy of refusing Truth in Evidence.** — The policy of declining to receive the truth in defence has been much questioned, both in England and the United States. Evidently there are circumstances casting on one a sort of moral duty to state facts derogatory to another, not hitherto deemed adequate to make the communication privileged.[1] On the other hand, Starkie forcibly observes: "The admitting truth to be a justification against a criminal charge would be attended with one difficulty and mischief so great as, without material alterations in our criminal procedure, to be in effect insuperable. As any one may commence a prosecution for a libel on any other party, if a justification of the truth were admissible, the character of an individual might be made the subject of investigation without his authority, even without his knowledge, and without his having any opportunity to defend himself; thus it would be in the power of any two malicious men most effectually to injure and calumniate any other individual under the pretext of a judicial inquiry."[2]

§ 920. **Statutes changing Common-law Rule.** — A sort of middle course has, therefore, been adopted by legislation in England, and generally in this country; a statute providing, in substance, that the truth may be given in evidence, to be a defence only when the further fact appears that the publication was made with good motives and for justifiable ends. In some of our States, the statute is even more favorable to defendants than this. So strongly, indeed, has this matter impressed itself on the public mind, that the provision is found even in the constitutions of some of the States.[3]

§ 921. **Changed Conditions.** — This alteration in the law of libel but adapts it to an altered state of society. In early periods, when it was being moulded to present wants, the newspaper was a thing unknown. Then a written statement by one of an unwel-

Eve, 1 Nev. & P. 229, 5 A. & E. 780; Rex *v.* Miles, 1 Doug. 284; Rex *v.* Wright, 2 Chit. 162. See Rex *v.* Dennison, Lofft, 148.

[1] Ante, § 914 et seq.

[2] 2 Stark. Slander, 253, 254.

[3] In England the provision is in Stat. 6 & 7 Vict. c. 96, § 6; as to which see Reg. *v.* Newman, 1 Ellis & B. 268, Dears. 85, 22 Law J. N. S. Q. B. 156, 17 Jur. 617, 18 Eng. L. & Eq. 113; Brown *v.* Brine, 1 Ex. D. 5, 6. The statute applies only to the final trial, not to the preliminary examination; Reg. *v.* Carden, 5 Q. B. D. 1, 14 Cox C. C. 359; Reg. *v.* Townsend, 10 Cox C. C. 356. As to the United States, see 2 Stark. Slander, 2d Am. ed. 252, note; Barthelemy *v.* People, 2 Hill, N. Y. 248; Commonwealth *v.* Bonner, 9 Met. 410; Commonwealth *v.* Snelling, 15 Pick. 337; The State *v.* White, 7 Ire. 180; Vol. I. § 319.

come truth concerning another did no good, since it did not reach the eyes of the public at large. But it did tend most powerfully, in a semi-barbarous condition of society, to stir up the hot blood of the person against whom it was made. Wisely, therefore, did the courts, in those circumstances, forbid the defendant, indicted for a libel, to rely on its truth in defence. Now all is changed. Our prisons, the gallows itself, must be deemed in some respects subordinate to the mightier power of the press, as correctives of the social wickedness of men. Many a wretch has felt the keen exposure of his villainy, when voiced from the million-tongued printed page, as no mortal ever felt the sentence bidding him mount the gallows to be hanged. Therefore a different rule should govern this question of libel now, from the one which properly governed it centuries ago.

§ 922. **The Intent.** — The universal doctrine of the law, that there can be no crime without a criminal mind,[1] necessarily has its application to libel.[2] But —

Implied Evil Mind. — The courts have held parties criminal by reason of an implied evil intent, in cases of libel, to a degree perhaps not witnessed under any other title of the criminal law. In the first volume, we saw how one is responsible for publications put forth by his servant;[3] but, when a man intentionally and personally publishes of another matter which is libellous, he is, according to the general doctrine, held to have malice in law against that other, whatever may have been his motives in fact.[4] And —

Intend Consequences. — The principle, that one is presumed to intend the probable consequences of his act, applies also to all other libels.[5]

§ 923. **In Principle how the Intent.** — It is believed, that the doctrines concerning the intent are not, in most of our States, so firmly established and accurately defined as to exclude from the

[1] Vol. I. § 287.

[2] Commonwealth *v.* Snelling, 15 Pick. 337; Rex *v.* Reeves, Peake Ad. Cas. 84; Root *v.* King, 7 Cow. 613; Rex *v.* Harvey, 3 D. & R. 464, 2 B. & C. 257.

[3] Vol. I. § 221. A late interesting case is Reg. *v.* Holbrook, 3 Q. B. D. 60, 4 Q. B. D. 42.

[4] Commonwealth *v.* Blanding, 3 Pick. 304; Commonwealth *v.* Bonner, 9 Met. 410; Commonwealth *v.* Snelling, 15 Pick. 337; Root *v.* King, 7 Cow. 613; Reg. *v.* Gathercole, 2 Lewin, 237. But see Rex *v.* Reeves, Peake Ad. Cas. 84.

[5] Reg. *v.* Lovett, 9 Car. & P. 462; Rex *v.* Harvey, 3 D. & R. 464, 2 B. & C. 257; Stockdale's Case, 22 Howell St. Tr. 237, 300. See Taylor *v.* The State, 4 Ga. 14; Commonwealth *v.* Snelling, 15 Pick. 337.

judicial mind, in future causes, every inquiry after the true principle. All men must submit to the laws. And if one has intentionally published words which the laws declare to be a libel, he can no more bring forward good motives in defence, than can the murderer, saying, that he killed his victim to render him happy in heaven.[1] If he published carelessly, not knowing or indifferent what, he should be held criminally responsible for any libel put forth, the same as though he had read every word. If he intrusted his publishing affairs to another, who was a careless, incompetent person, as he knew, he should likewise be holden to answer criminally for any libel. But beyond this outer verge the doctrine should not be carried. When a man — for instance, the proprietor of a newspaper — is painstaking in the selection of his assistants, is ready to correct any error into which they may have fallen, is mindful of his high trust as a manager of a vast power, it is unjust, oppressive, contrary to all true legal rule, for the judge to tell the jury, that they must convict him for words introduced into his sheet by some accident over which he had no control.

§ 924. **In what Sense the Words.** — From the necessity of an evil intent, proceeds the doctrine mentioned in our first volume, that the words are to be understood in the sense meant by the party accused.[2] Shaw, C. J., stated this doctrine thus: "It is a general rule of construction, in actions of slander, indictments for libel, and other analogous cases, where an offence can be committed by the utterance of language, orally or in writing, that the language shall be construed and understood in the sense in which the writer or speaker intended it."[3]

Obscure and Ambiguous. — He proceeds: "If, therefore, obscure and ambiguous language is used, or language which is figurative or ironical, courts and juries will understand it according to its true meaning and import, and the sense in which it was intended, to be gathered from the context, and from all the facts and circumstances under which it was used."[4]

§ 925. **Ironical.** — So, also, the form of the libel is immaterial; for, if the language is ironical,[5] or is otherwise so framed as not to

[1] See Vol. I. § 309 and note.

[2] Vol. I. § 308.

[3] Commonwealth v. Kneeland, 20 Pick 206, 216.

[4] Ib.

[5] 1 Hawk. P. C. Curw. ed. p. 543, § 4; Reg. v. Browne, Holt, 425; s. c. nom Reg. v. Brown, 11 Mod. 86.

convey directly the idea meant, yet, if it is adapted to accomplish the evil purpose, it is sufficient.[1]

Incomplete Expression. — An incomplete expression is sufficient, provided it is understood; as, if the words are "the bishops," the meaning may be shown to be "the bishops of England."[2] So "a defamatory writing," says Hawkins, "expressing only one or two letters of a name in such a manner that, from what goes before and follows after, it must needs be understood to signify such a particular person, in the plain, obvious, and natural construction of the whole, and would be perfect nonsense if strained to any other meaning, is as properly a libel as if it had expressed the whole name at large; for it brings the utmost contempt upon the law to suffer its justice to be eluded by such trifling evasions; and it is a ridiculous absurdity to say, that a writing which is understood by every the meanest capacity cannot possibly be understood by a judge and jury."[3]

§ 926. **What Act is necessary.** — No crime is, at the common law, committed except when there is some act added to the criminal intent.[4] This proposition indicates the true doctrine concerning libels, as indictable offences; it is not necessary that there should be any complete publication, but —

Attempt. — An attempt to publish, wherein there is an act and not merely an intent, is all which the law requires.[5] Perhaps, in strictness, the attempt is not to be deemed a substantive offence, but to stand on the ground of other attempts; yet, as this offence of libel is misdemeanor, not felony, the distinction is practically unimportant.

§ 927. **Merely writing Libel.** — The attempt appears to be sufficient where the party merely writes a libel, with the criminal intent.[6]

Publishing. — And for one to commit the full offence of publishing, he need not make the publication general; to cause it to be conveyed to any person who reads it, is sufficient.[7] Even the

[1] See Rex *v.* Woodfall, Lofft, 776; Rex *v.* Slaney, 5 Car. & P. 213; Rex *v.* Jenour, 7 Mod. 400.

[2] Baxter's Case, 3 Mod. 69. And see Barnett *v.* Allen, 3 H. & N. 376.

[3] 1 Hawk. P. C. Curw. ed. p. 543, § 5.

[4] Vol. I. § 204–206.

[5] Rex *v.* Paine, 5 Mod. 163, 167.

[6] Rex *v.* Burdett, 4 B. & Ald. 95, 159. Rex *v.* Paine, 5 Mod. 163, 167. See, however, Lamb's Case, 9 Co. 59 *b*, Sir F. Moore, 813. And see Rex *v.* Bear, 2 Salk. 417; Anonymous, 1 Vent 31.

[7] Swindle *v.* The State, 2 Yerg. 581.

sale of an obscene print in private, to one who first requested to see it, the motive being to prosecute the seller, has been deemed an adequate publication.[1] Moreover, —

To Person libelled. — The full criminal offence is committed by sending the libel to the one libelled, though it reaches the ears of no third person.[2] But for this the civil action cannot be maintained.[3]

II. *The Different Kinds of Libel.*

§ 928. **What for this Sub-title.** — Descending now from this general view of criminal libels, we shall classify them, and subject each class to a minuter inspection.

§ 929. *Libels on Private Individuals :* —

How defined. — A libel of this class is any writing, picture, or other like representation of a nature to blacken the reputation of the person, or to hold him up to contempt and ridicule.[4]

What accomplish. — There is no need it should actually effect this object; it may, indeed, be powerless;[5] but it must be calculated to produce the result.

§ 930. **Imputing Crime.** — It does not require the imputation of

[1] Reg. *v.* Carlile, 1 Cox C. C. 229.

[2] Phillips *v.* Jansen, 2 Esp. 624; Rex *v.* Pownell, W. Kel. 58; The State *v.* Avery, 7 Conn. 226; Rex *v.* Wegener, 2 Stark. 245; Swindle *v.* The State, supra; Reg. *v.* Brooke, 7 Cox C. C. 251. And see, on the matter of this section, 1 Hawk. P. C. Curw. ed. p. 545, 546. In England a criminal information was refused, for a letter between private individuals, containing abusive matter, but not exciting to a breach of the peace. Wightman, J., observed: "No doubt the expressions made use of in this letter are libellous, and would support an indictment; but I do not think you have shown such a case as calls for the intervention of this court." Ex parte Dale, 2 Com. Law, 870, 871, 28 Eng. L. & Eq. 165.

[3] Sheffill *v.* Van Deusen, 13 Gray, 304.

[4] Ante, § 908, note; 1 Hawk. P. C. Curw. ed. p. 542, § 1; Commonwealth *v.* Clap, 4 Mass. 163, 168; Dexter *v.* Spear, 4 Mason, 115; The State *v.* Henderson, 1 Rich. 179; Rex *v.* Benfield, 2 Bur. 980; Hillhouse *v.* Dunning, 6 Conn. 391; Steele *v.* Southwick, 9 Johns. 214; The State *v.* Farley, 4 McCord, 317; The State *v.* Atkins, 42 Vt. 252. **On what Principle.** — Starkie says: "It seems to be perfectly settled, that any malicious defamation of any person, expressed in print or in writing, or by means of pictures or signs, and tending to provoke him to anger and acts of violence, or to expose him to public hatred, contempt, or ridicule, amounts to a libel in the indictable sense of the word. And since the reason is, that such publications create ill blood, and manifestly tend to a disturbance of the public peace, the degree of discredit is immaterial to the essence of the libel, since the law cannot determine the degree of forbearance which the party reflected upon will exert," &c. 2 Stark. Slander, 210, 211.

[5] Rex *v.* Woodfall, Lofft, 776.

a crime;[1] though such imputation is generally, perhaps always, sufficient to render the publication libellous.[2]

Compared with Actionable. — And "it seems," says Starkie, "that, in general, where a defamatory libel reflecting on the character of an individual will support an action for damages, the publication of it amounts to an indictable offence, inasmuch as it tends to provoke animosity and violence, and to disturb the peace of society."[3] But the similitude is not complete between libels indictable and actionable.[4]

§ 931. **Illustrations of Words not indictable.** — The following have been adjudged not libellous: —

Refusal to water Street. — "The above druggist, in the city of Detroit, refusing to contribute his mite, with his fellow-merchants, for watering Jefferson Avenue, I have concluded to water said avenue, in front of Pierre Feller's store, for the week ending June 27, 1846;" the court observing, that one had a right to refuse, therefore the statement of his refusal had no legal tendency to hold him up to ridicule or contempt.[5]

Contradict Witness. — Nor is it libellous to publish a positive contradiction of facts sworn to by a witness; because this does not imply perjury by the witness.[6]

Beware of Facts, &c. — The following words come short: "Dear Sir, As Mrs. Reynal says she has been most cruelly censured without a cause, which is absolutely false, I would advise her to beware, lest facts, which are stubborn things, be brought to light, and you will then see who you keep under your roof. She need not go among her female friends and say she has been cruelly censured, as from her general character, which is perfectly and universally known, we are sure to hear all she says. Yours, &c., John Farley."[7]

General Abuse. — And terms of mere general abuse are not enough.[8] Accordingly the words, "The mayor and aldermen of

[1] The State *v.* Henderson, 1 Rich. 179; Clement *v.* Chives, 4 Man. & R. 127; s. c. nom. Clement *v.* Chivis, 9 B. & C. 172; Hillhouse *v.* Dunning, 6 Conn. 391; Steele *v.* Southwick, 9 Johns. 214; Clark *v.* Binney, 2 Pick. 113; Rex *v.* Pownell, W. Kel. 58.

[2] The State *v.* White, 7 Ire. 180; Hillhouse *v.* Dunning, 6 Conn. 139; Walker *v.* Winn, 8 Mass. 248.

[3] 2 Stark. Slander, 211, 212. And see Smith *v.* The State, 32 Texas, 594.

[4] See, for instance, ante, § 918, 927.

[5] People *v.* Jerome, 1 Mich. 142.

[6] Steele *v.* Southwick, 9 Johns. 214.

[7] The State *v.* Farley, 4 McCord, 317

[8] Tappan *v.* Wilson, 7 Ohio, 190.

A are a pack of as great villains as any that rob on the highway," were held in an old case not to be indictable; the somewhat singular reason assigned being, "for what is it to the government that the mayor, &c., are a pack of rogues?"[1]

§ 932. **Illustrations of Words Indictable.** — On the other hand, the following are specimens of adjudged libels: A published statement, that a person named has been guilty of gross misconduct, in insulting two females and some gentlemen, in a barbarous manner;[2] a printed account of a ludicrous marriage, between an actress and a married man;[3] a statement, that a person mentioned voted twice for officers on the same ballot at a State election;[4] that he attended a political meeting while his wife lay dead at home;[5] that he labors under mental derangement.[6]

"Swore terribly." — So of the following words: "'Our army swore terribly in Flanders,' said Uncle Toby; and, if Toby were here now, he might say the same of some modern swearers: the man [a witness] is no slouch at swearing to an old story." For if we assume that these words do not imply perjury, still they hold up the person to contempt and ridicule, as being too thoughtless if not too criminal duly to regard his obligations as a witness, and unworthy of credit.[7] The same was held, where a party to a public investigation into his conduct as an officer published, in a report of the investigation, the following comments on the testimony of a witness: "I am extremely loath to impute to the witness or his partner improper motives in regard to the false accusations against me: yet I cannot refrain from the remark, that, if their motives have not been unworthy of honest men, their conduct in furnishing materials to feed the flame of calumny has been such as to merit the reprobation of every man having a particle of virtue or honor. They have both much to repent of for the groundless and base insinuations they have propagated against me."[8] Likewise —

[1] Rex *v.* Granfield, 12 Mod. 98. See Rex *v.* Baker, 1 Mod. 35; Rex *v.* Waite, 1 Wils. 22; Rex *v.* Spilker, 2 Show. 207.

[2] Clement *v.* Chives, 4 Man. & R. 127; s. c. nom. Clement *v.* Chivis, 9 B. & C. 172.

[3] Rex *v.* Kinnersley, 1 W. Bl. 294. The court, on granting the information, observed: "It is high time to put a stop to this intermeddling in private families."

[4] Walker *v.* Winn, 8 Mass. 248.

[5] The State *v.* Atkins, 42 Vt. 252.

[6] 2 Stark. Slander, 181; Rex *v.* Harvey, 2 B. & C. 257.

[7] Steele *v.* Southwick, 9 Johns. 214.

[8] Clark *v.* Binney, 2 Pick. 113.

"Hireling Murderer." — It is indictable to publish of one, that he is a "hireling murderer."[1]

§ 933. **Illustrations of Libels addressed to the Person.** — Of libels addressed *to* the person complaining, the following are specimens: "You are a scoundrel, and defrauded the king of his duty; I will prick you to the heart, and call you to an account."[2] Also a letter, by a man, to the wife of another (in Connecticut, where adultery is felony), implying that she had acted libidinously toward the writer, and had invited him to an adulterous intercourse with her, and sought opportunities for consummating the act; the object of the letter being to insult and abuse her, debauch her affections, alienate them from her husband, entice her into adultery, and bring her into disgrace and contempt.[3] These were held to be indictable libels.

§ 934. *Libels on Bodies of Men and Corporations:* —

Numbers. — A libel need not be on a particular person.[4] If directed against many it is equally an offence, and perhaps the fact of numbers defamed renders the act the more reprehensible.[5] Therefore, —

Corporation. — A corporation is in proper circumstances indictable for libel.[6] The words "whenever a burgess of it puts on his cap and gown, Satan enters into him," were once adjudged adequate;[7] but we may doubt whether they should be so deemed now.

§ 935. *Libels by Corporations:* —

In Corporate Capacity. — A corporation, in its corporate capacity, has been held liable to a civil action for libel.[8] The consequence is not inevitable that therefore it would be indictable,[9] yet such also has been adjudged.[10]

Individual Members. — However this may be, the individual members who participated in the libel are indictable, even though it was published in the corporate capacity.[11] Therefore an order, entered in the books of a corporation, stating that one named, against whom large damages in a suit for malicious prosecution in carrying on an indictment had been recovered, acted from good

1 Smith *v.* The State, 32 Texas, 594.
2 Rex *v.* Pownell, W. Kel. 58.
3 The State *v.* Avery, 7 Conn. 266.
4 2 Stark. Slander, 213.
5 See Vol. I. § 232, 235, 243–245, 250–252; ante, § 147, 161.
6 The State *v.* Boogher, 3 Misso. Ap. 442; Brennan *v.* Tracy, 2 Misso. Ap. 540.
7 Rex *v.* Baker, 1 Mod. 35.
8 Aldrich *v.* Press Printing Co., 9 Minn. 133.
9 Vol. I. § 422.
10 The State *v.* Atchison, 3 Lea, 729.
11 Vol. I. § 424.

motives, was held to subject the members making it to an information for libel. Said Buller, J.: "Nothing can be of greater importance to the welfare of the public, than to put a stop to the animadversions and censures which are so frequently made on courts of justice in this country."[1]

§ 936. *Libels on Official Persons:* —

Specially reprehensible. — Libels on official persons are specially reprehensible. Therefore —

Conduct of Jurors. — It is indictable to publish of one in his capacity of petit juror, in a civil cause, that he agreed with another juror to stake, upon a game of draughts, the decision of the amount of damages to be awarded.[2] So it is libellous to say, "the grand jury that presented me are perjured rogues;" the court observing, "The words are scandalous, and an offence, though the presentment were false; for a grand jury ought not to be called 'perjured rogues,' though they had by mistake or misinformation made a false presentment."[3] And although it is lawful "with decency and candor to discuss the propriety of the verdict of a jury or the decisions of a judge," — yet, if a publication contains no reasoning, and is put forth with the view of bringing into contempt the administration of justice, not of illustrating truth, it is libellous.[4]

Town Clerk. — A criminal information was once granted on the following words, in a letter to a mayor: "I am sure you will not be persuaded from doing justice by any little arts of your town clerk, whose consummate malice and wickedness against me and my family will make him do any thing, be it ever so vile."[5]

Justice of Peace. — Another, for publishing, of a justice of the peace and alderman, that he was scandalously guilty of telling a lie; "nothing," says the report, "tending more to breach of the peace than the word *lie*."[6]

§ 937. *Libels on Candidates for Office:* —

How far Privileged. — The books are less distinct than one would expect on the question, how far, in our elective government, scandalous publications reflecting on candidates for

[1] Rex *v.* Watson, 2 T. R. 199.

[2] Commonwealth *v.* Wright, 1 Cush. 46.

[3] Rex *v.* Spiller, 2 Show. 207, 210.

[4] Rex *v.* White, 1 Camp. 359, note. And see Anonymous, Lofft, 462; Reg. *v.* Collins, 9 Car. & P. 456; Commonwealth *v.* Snelling, 15 Pick. 321.

[5] Rex *v.* Waite, 1 Wils. 22.

[6] Rex *v.* Staples, Andr. 228. And see Rex *v.* Brigstock, 6 Car. & P. 184.

office are privileged.[1] To render privileged any communication, it should be made properly, to the proper persons. Therefore, if a man is a candidate, not for the popular vote, but for appointment to office by officers having the appointing power, this fact does not render privileged an attack on him through the newspapers; it simply protects a proper remonstrance to those in whom the appointing power is lodged.[2] Again, —

Truth in Evidence. — Without the help of a statute allowing the truth of a libel to be given in evidence, one indicted for a libel on a candidate for office may show it to be true in his justification.[3] But —

Whether fully Privileged. — This is not holding the libel to be privileged in the full meaning of the expression, rendering it sufficient in defence that the motives were good and the words were believed to be true; and, in this sense, the Minnesota court laid it down distinctly and forcibly, that libellous matter, published in a newspaper, in regard to a candidate for public office, is not privileged.[4] On principle, if a man is a candidate for the popular vote, and there are newspapers circulating in his district, a duty is imposed on all good citizens to communicate to the voters information concerning his fitness, and the newspaper is the proper channel; so that the communication becomes privileged. And this is believed to be the better doctrine even in point of authority.[5]

[1] Ante, § 914.

[2] Hunt *v.* Bennett, 19 N. Y. 173.

[3] Commonwealth *v.* Clap, 4 Mass. 163, 169; Root *v.* King, 7 Cow. 613; ante, § 918.

[4] Aldrich *v.* Press Printing Co., 9 Minn. 133.

[5] In Townshend Slander & Lib. 2d ed. § 247, is a full collection of authorities, and the question well put by the author. There is a wide difference between what is said about an officer and a candidate for office. Parsons, C. J., once intimated that every person holding an elective office should be regarded as a candidate for such office; "for," he said, "as a re-election is the only way his constituents can manifest their approbation of his conduct, it is to be presumed that he is consenting to a re-election if he does not disclaim it. For every good man would wish the approbation of his constituents for meritorious conduct." Commonwealth *v.* Clap, supra, at p. 169, A. D 1808. These observations, the reader will note, were made before the *outs* among the demagogues had established the principle of "rotation in office." At present, the presumption should rather be, that every man who talks loudly about political affairs, and shows himself to be destitute of political wisdom, shall be deemed a candidate for office, particularly for every office for which he is specially unfitted. But to hold that every officer shall be deemed already a candidate for re-election, is to abolish the distinction altogether; and probably no judge at the present day would follow the *dictum* of this learned chief justice. **Conduct at Political Meeting.** — According to an English case, the conduct of a person at a public meeting to pro-

§ 938. *Libels on Distinguished Persons abroad: —*

Heavy Offences. — The connection of government with government is so intimate, that libels on persons of distinction and authority abroad are particularly reprehensible.[1]

mote the election of one to parliament is a proper subject for discussion, and unfavorable comments on it are privileged. Davis *v.* Duncan, Law Rep. 9 C. P. 396.

[1] 1 Russ. Crimes, 3d Eng. ed. 246. Starkie has collected several cases, which he states as follows: **Instances.** — "In the case of Rex *v.* D'Eon [see Rex *v.* D'Eon, 1 W. Bl. 510, 3 Bur. 1513], an information was filed against the defendant by the attorney-general for publishing a libel upon the Count de Guerchy, who was at that time residing in this kingdom in the capacity of ambassador from the court of France. The information charged the defendant with an intention to defame the character and abilities of the Count de Guerchy; to render him ridiculous and contemptible; to arraign his conduct and behavior in his character of ambassador; and to cause it to be believed that he had, after his arrival in this kingdom, been guilty of unjust, unwarrantable, and oppressive proceedings towards the defendant and his friends; and to insinuate, that he was not fit or qualified to execute the office and functions of ambassador. The defendant was convicted. — Lord George Gordon [see Lord George Gordon's Case, 22 Howell St. Tr. 213] was found guilty upon an information, for having published some severe reflections upon the Queen of France, in which she was represented as the leader of a faction; and Mr. Justice Ashurst in passing sentence observed, that, unless the authors of such publications were punished, their libels would be supposed to have been made with the connivance of the State. — The defendant, John Vint [see Vint's Case, 27 Howell St. Tr. 627], was found guilty upon an information, charging him with having published the following libel: 'The Emperor of Russia is rendering himself obnoxious to his subjects, by various acts of tyranny; and ridiculous in the eyes of Europe, by his inconsistency; he has lately passed an edict to prohibit the exportation of deals and other naval stores. In consequence of this ill-judged law, a hundred sail of vessels are likely to return to this country without their freight;' with intent to traduce the Emperor of Russia, and interrupt and disturb the friendship subsisting between that country and Great Britain. — Jean Peltier [see Peltier's Case, 28 Howell St. Tr. 529] was found guilty upon an information, charging him with having published a malicious libel, with intent to vilify Napoleon Bonaparte, the Chief Consul of the French Republic, and to excite and provoke the citizens of the said republic to deprive the said Napoleon Bonaparte of his consular dignity, and to kill and destroy him, and to interrupt the friendship and peace subsisting between our Lord the King and his subjects and the said Napoleon Bonaparte and the French republic. The most obnoxious passages of the libel were these: 'O! eternal disgrace of France; — Cæsar, on the bank of the Rubicon, has against him in this quarrel the Senate, Pompey, and Cato; and in the plains of Pharsalia if fortune is unequal, if you must yield to the destinies Rome in this sad reverse, at least there remains to avenge you a poignard among the last Romans.' 'As for me, far from envying his (Bonaparte's) lot, let him name (I consent to it) his worthy successor. Carried on the shield, let him be elected Emperor. Finally (and Romulus recalls the thing to mind), I wish that on the morrow he may have his apotheosis. Amen.' Upon the trial, Lord Ellenborough, C. J., referred to the cases of Lord George Gordon and Vint, and said, 'I lay it down as law, that any publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel; and particularly where it has a tendency to interrupt the amity and peace between

State Courts — United States. — But, for reasons which sufficiently appear in other parts of these volumes,[1] there may be a question, to what extent the State tribunals in our country can take cognizance of this class of libels; and the United States courts have no common-law jurisdiction.[2]

§ 939. *Libels on the Dead:* —

General Doctrine. — Any writing put forth to blacken the memory of one deceased is a libel indictable;[3] "for it stirs up others of the same family, blood, or society, to revenge, and to break the peace."[4]

§ 940. **Illustrations — (How the Indictment).** — In one case, after the announcement of the death of a member of parliament, it was added: "He was blessed with an ample fortune, which he enjoyed in a manner that rendered him in early years of life a truly valuable husband, and a friend. He could not be called a friend to his country; for he changed his principles for a red ribband, and voted for that pernicious project, the excise." These words were held to be a libel; perhaps, in part, because they reflected on the government.[5] But something more must be alleged in the indictment — a question possibly of pleading — than simply, that the defendant published the words. Where the libel was on a private person deceased, an allegation not charging it to have been made to bring contempt on his family, or to stir up hatred against it, or to provoke his relatives to a breach of the peace, was held to be insufficient. "To say, in general," said Lord Kenyon, C. J., "that the conduct of a dead person can at no time be canvassed; to hold, that, even after ages are passed, the conduct of bad men cannot be contrasted with good, — would be to exclude the most useful part of history. And therefore it must be allowed, that such publications may be made fairly and honestly. But let this be done whenever it may, whether soon or late after the death of the party, if it be done with malevolent purpose, to vilify the memory of the deceased, and with a view to injure his posterity, as in Rex *v.* Critchley [the case just stated], then it comes within

the two countries.'" 2 Stark. Slander, 216–219.

[1] Vol. I. § 177, 178, 190–203; ante, § 281, 284–288, 611.

[2] See United States *v.* Hudson, 7 Cranch, 32; post, § 942.

[3] 1 Hawk. P. C. Curw. ed. p. 542, § 1; 1 Russ. Crimes, 3d Eng. ed. 243; Commonwealth *v.* Clap, 4 Mass. 163, 168.

[4] Case de Libellis Famosis, 5 Co. 125

[5] Rex *v.* Critchley, 4 T. R. 129, note post, § 941.

the rule; then it is done with a design to break the peace, and then it becomes illegal." [1]

§ 941. *Libels on the Government:* —

How defined. — A libel on the government is any written calumny tending to excite disaffection toward it.[2]

Compared with Treason. — Treason, at the common law, is the most aggravated form of one general offence, of which libel on the government stands at the outer border.[3]

§ 942. **Discussion not forbidden.** — The object of this branch of our legal system is, not to interfere with temperate and reasoning discussions of political questions and of public measures, when conducted in a proper manner to promote lawful reform, but to check those uprisings of mind which lead to unlawful revolution.[4]

United States — States. — The courts of the United States have no common-law jurisdiction of these libels.[5] How it is in the States is a complicated inquiry not to be entered into here. Practically the punishment of them is hitherto nearly or quite unknown in our country.

§ 943. *Obscene Libels:* —

Doctrine defined. — The publication of any writing tending to corrupt the public morals is clearly a libel indictable. Hawkins indeed expresses a doubt, whether such a writing, "full of obscene ribaldry, without any kind of reflection upon any one," is so; but, whatever question may have been entertained heretofore, "it is now," in the language of Mr. Starkie, "fully established, that any immodest and immoral publication, tending to corrupt the mind, and to destroy the love of decency, morality, and good order, is punishable in the temporal courts" [6] of England, and in the common-law criminal tribunals of this country.[7] Such is an

[1] Rex *v.* Topham, 4 T. R. 126, 129.

[2] 1 Gab. Crim. Law, 647; 2 Stark. Slander, 160 et seq.; Reg. *v.* Drake, 11 Mod. 78; Rex *v.* Pain, Comb. 358; Rex *v.* Horne, Cowp. 672.

[3] See ante, § 911.

[4] Authorities in last note but one; also Rex *v.* Woodfall, Lofft, 776; Rex *v.* Lambert, 2 Camp. 398; Reg. *v.* Collins, 9 Car. & P. 456; Reg. *v.* Sullivan, 11 Cox C. C. 44.

[5] United States *v.* Hudson, 7 Cranch, 32; ante, § 938.

[6] 2 Stark. Slander, 155.

[7] Commonwealth *v.* Holmes, 17 Mass. 336; Commonwealth *v.* Sharpless, 2 S. & R. 91; Bell *v.* The State, 1 Swan, Tenn. 42. See Ex parte Slattery, 3 Pike, 484. And see The State *v.* Appling, 25 Misso. 315; Barker *v.* Commonwealth, 7 Harris, Pa. 412; People *v.* Hallenbeck, 2 Abb. N. Cas. 66; Willis *v.* Warren, 1 Hilton, 590; Commonwealth *v.* Dejardin, 126 Mass. 46.

obscene book [1] or print.[2] The law seems to stand on the same ground, relating to this subject, as to the subject of the exposure of the person already discussed.[3]

§ 944. **Circulation by Mail.** — The circulation of obscene books through the mails is prohibited by act of Congress.[4]

III. *Verbal Slander.*

§ 945. **Whether indictable.** — The general question, whether mere words uttered, but not written, are indictable, seems not clear on the authorities. As one of principle, it embarrasses us less; because, since verbal slander is actionable, there appears to be no reason why, in cases in which it operates to the detriment of the public, in distinction from a mere individual, according to the principles of public detriment unfolded in the preceding volume,[5] it should not be punished.

§ 946. **Under other Names indictable.** — And it is clear on the authorities that various forms of oral words are indictable when called by some other name than slander. Thus, —

Illustrations — (Blasphemy — Challenge to Duel — Obscenity). — We have seen,[6] that oral blasphemy is a crime; also an oral challenge to fight a duel;[7] likewise the public utterance of obscene words.[8] Again, —

Contempts of Court. — There are contempts of court, consisting of words spoken to the judge or magistrate, which, as we have seen,[9] are indictable.

Under Name of Slander. — And in various cases, the broader general doctrine, that verbal slander, especially against magistrates, corporations, and the like, is under some circumstances indictable, appears to be recognized.[10] For instance, —

[1] Commonwealth *v.* Holmes, 17 Mass. 336; Rex *v.* Curl, 2 Stra. 788, overruling Reg. *v.* Read, 11 Mod. 142.

[2] Commonwealth *v.* Sharpless, 2 S. & R. 91; Dugdale *v.* Reg., 1 Ellis & B. 435, 16 Eng. L. & Eq. 380.

[3] Vol. I. § 1125 et seq.

[4] R. S. of U. S. § 3878; Stat. 1865, c. 89, § 16, 13 Stats. at Large, 507.

[5] Vol. I. § 230 et seq.

[6] Ante, § 76 et seq.; The State *v.* Steele, 3 Heisk. 135.

[7] Vol. I. § 539. And see ante, § 312.

[8] Bell *v.* The State, 1 Swan, Tenn. 42; The State *v.* Appling, 25 Misso. 315; Barker *v.* Commonwealth, 7 Harris, Pa. 412; The State *v.* Barham, 79 N. C. 646; The State *v.* Brewington, 84 N. C. 783.

[9] Ante, § 265, 266.

[10] Vol. I. § 470, 539, 591; Rex *v.* Baker 1 Mod. 35; Reg. *v.* Nun, 10 Mod. 186, 187; Rex *v.* Darby, 3 Mod. 139, Comb. 65; Anonymous, Comb. 46; Reg. *v.* Taylor, 2 Ld. Raym. 879. See also 2 Stark

Words against Grand Jury. — The words, merely spoken, that "the last grand jury that presented me are perjured rogues," have been held to be indictable.[1]

Words sung in Street. — And an information has been maintained for singing, in the streets, songs reflecting on the prosecutor's children, with intent to destroy his domestic happiness.[2] But —

Contrary Doctrine. — There are other cases which seem to be contrary to these, holding the like words not to be adequate; and some of them go far to indicate, that no words are alone indictable as mere slander; but that they must have some other foundation on which the crime involved in the uttering of them may rest.[3] Plainly, not all actionable words are indictable; as, while a civil suit will lie for calling a man a thief, an indictment will not.[4]

§ 947. **In Principle.** — In legal reason, first, not all spoken words can be indictable when they would be if written: secondly, under some circumstances, some spoken words must be indictable. As to the first proposition, reference need only be made to the rules which govern the civil suit for oral slander. In this suit, something more must be shown of the words than that they would be actionable if they were written; and plainly the rule could not be drawn more tight in criminal jurisprudence. As to the second proposition, to say, that in no circumstances will the criminal law bridle the tongue, is to give to this member too great freedom to be tolerated in a civilized community. Suppose, for instance, a man should make it his business to go through a principal street in a large city, telling infamous false tales of every one whose name he could get, — becoming a common bearer of this kind of scandal, — it would be a reproach to the law not to curb the nuisance.[5]

Slander, 194-197, 208, 220, 221; Ex parte Marlborough, 5 Q. B. 955, 1 New Sess. Cas. 195, 13 Law J. N. s. M. C. 105, 8 Jur. 664. See Rex *v.* Penny, 1 Ld. Raym. 153; Reg. *v.* Rea, 17 Ir. Com. Law, 584.

[1] Rex *v.* Spiller, 2 Show. 207, 210.

[2] Rex *v.* Benfield, 2 Bur. 980.

[3] Rex *v.* Weltje, 2 Camp. 142; Reg. *v.* Langley, 3 Salk. 190, 2 Ld. Raym. 1029; Reg. *v.* Rogers, 7 Mod. 28; Rex *v.* Burford, 1 Vent. 16; Rex *v.* Wrightson, 11 Mod. 166; Rex *v.* Walden, 12 Mod. 414, Ex parte Chapman, 4 A. & E. 773; Rex *v.* Pocock, 2 Stra. 1157, 7 Mod. 310; Reg. *v.* Shaftow, 11 Mod. 195; Rex *v.* Leafe, Andr. 226; Rex *v.* Bear, 2 Salk. 417; s. c. nom. Rex *v.* Beare, 1 Ld. Raym. 414, 416. So laid down in Missouri, The State *v.* Wakefield, 8 Misso. Ap. 11.

[4] Rex *v.* Freake, Comb. 13.

[5] And see Vol. I. § 472–478, 539.

IV. *Remaining and Connected Questions.*

§ 948. **Misdemeanor — Punishment.** — Libel is misdemeanor;[1] punishable in the way pointed out in the preceding volume.[2]

Participants. — And we have seen,[3] that all who participate in misdemeanors are principal offenders. Thus, "if one repeats and another writes a libel, and a third approves what is writ, they are all makers of such libel; for all persons who concur, and show their assent or approbation to do an unlawful act, are guilty."[4]

§ 949. **Attempt.** — We have already, in this chapter, considered the doctrine of attempt.[5] On the principle involved in this doctrine, the transmission of a sealed letter, containing libellous matter, is indictable.[6] It is an attempt to publish the libel.

Each copy. — Every separate copy of a libel, which a defendant publishes, is a several publication, subjecting him to a distinct indictment.[7]

[1] 1 Hawk. P. C. Curw. ed. p. 547, § 21; Rex *v.* Dangerfield, 3 Mod. 68; Case de Libellis Famosis, 5 Co. 125.

[2] Vol. I. § 940 et seq.; Rex *v.* Benfield, 2 Bur. 980, 985.

[3] Vol. I. § 684–689, 705.

[4] Reg. *v.* Drake, Holt, 425. And see Rex *v.* Paine, 5 Mod. 163, 167; Rex *v.* Bear, Carth. 407, 408; Rex *v.* Williams 2 Camp. 646; Reg. *v.* Cooper, 1 Cox C. C. 266.

[5] Ante, § 926, 927.

[6] Hodges *v.* The State, 5 Humph. 112.

[7] Rex *v.* Carlile, 3 B. & Ald. 161; s. c. nom. Rex *v.* Carlisle, 1 Chit. 451.

For LIQUOR NUISANCE, see Stat. Crimes.
LIQUOR SELLING, see Stat. Crimes.
LIVING IN ADULTERY, see Stat. Crimes.
LIVING IN FORNICATION, see Stat. Crimes.

CHAPTER XXVIII.

LORD'S DAY.[1]

§ 950–952. Introduction.
953–964. By what Acts.
965. Repetitions amounting to Nuisance.
966, 967. Connecting other Offences with this.
968–970. Remaining and Connected Questions.

§ 950. **Nature of the Offence.** — The violation of the Lord's Day or Christian Sabbath is forbidden by statutes in England and in all our States. Whether it is an offence at the common law, and, if so, what are its limits, are questions considered in other connections.[2] We saw, in the first volume,[3] on what principle the law, whether statutory or common, enjoins on the whole community the setting apart — for rest, or for worship, or for both — of one day in seven; and we saw, that, though most people deem the rest of the Sabbath to be of Divine injunction, pertaining to the department of religious duty, yet, whether so or not, still the thing itself is of the highest consequence to man in all his interests, even those which are physical and material. Therefore the violation of the Lord's Day, or the Sabbath, or the First Day of the Week, — different terms to signify the same thing, — is properly made punishable.

§ 951. **Statutes constitutional.** — Yet, plain though this proposition is, the question has been agitated, whether enactments against Sabbath-breaking are not repugnant to those constitutional provisions which, in most of our States, secure to the people freedom of worship and the rights of conscience. Thus, in Pennsylvania: "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own

[1] For matter relating to this title, see Vol. I § 499; Stat. Crimes, § 143, 198, 213, 237, 245, 560, 852. For the pleading, practice, and evidence, see Crim. Proced. II. § 812 et seq.

[2] Vol. I § 499 and note; Crim. Proced. II. § 812.

[3] Vol. I. § 499 and note.

conscience; no man can, of right, be compelled to attend, erect, or support any place of worship, or to maintain any ministry, against his consent. No human authority can, in any case whatever, control or interfere with the rights of conscience; and no preference shall be given by law to any religious establishment or modes of worship." But this provision is held not to be violated by laws, and their enforcement, against Sabbath-breaking.[1] A like doctrine prevails in Arkansas,[2] in Indiana,[3] in California,[4] in Texas,[5] in Missouri,[6] and in Massachusetts.[7] It prevails also in New York, where moreover it has been held, that a statute forbidding theatres to be opened on Sunday does not "deprive the actor of his property," which are the words of the constitution, though it prohibits what may be the most profitable use of the theatre.[8] The institution of the Sabbath, as a day of rest from worldly labor, dear to him who reveres it for its Divine origin, has to the statesman and jurist a significance of a different kind. It is the corner-stone of public morality and happiness, viewed merely as of civil regulation. And though the law should not foster any particular sect of religion at the expense of the rest, or even at the expense of him who conscientiously rejects all current forms; still it should not cast off a good thing, beneficial to the entire community, simply because the majority of the people believe it, not only to be good, but to be sanctioned also by religion.

§ 952. **How the Chapter divided.** — We shall consider, I. By what Acts Particular Statutory Provisions are violated; II. Repetitions

[1] Specht *v.* Commonwealth, 8 Barr, 312.

[2] Shover *v.* The State, 5 Eng. 259.

[3] Voglesong *v.* The State, 9 Ind. 112; Foltz *v.* The State, 33 Ind. 215; Schlit *v.* The State, 31 Ind. 246.

[4] Ex parte Andrews, 18 Cal. 678; Ex parte Bird, 19 Cal. 130. But see Ex parte Newman, 9 Cal. 502.

[5] Gabel *v.* Houston, 29 Texas, 335; Bohl *v.* The State, 3 Texas Ap. 683.

[6] The State *v.* Ambs, 20 Misso. 214.

[7] Commonwealth *v.* Has, 122 Mass. 40.

[8] Lindenmuller *v.* People, 33 Barb. 548; Neuendorff *v.* Duryea, 69 N. Y. 557. **Saturday.** — In Massachusetts it was held, that a statute prohibiting the use of bowling alleys after six o'clock *Saturday* afternoon is constitutional. And the court observed: "It is clearly within the power of the legislature to make police regulations as to the hours and modes of occupying places of amusement, so as to make their use consistent with the peace of the community. The reason which induced the legislature to make it penal to suffer any persons to play after certain hours in the evening are not for us to inquire into." Commonwealth *v.* Colton, 8 Gray, 488. **By-laws.** — As to city ordinances against Sabbath-breaking, see Canton *v.* Nist, 9 Ohio State, 439; Piqua *v.* Zimmerlin, 35 Ohio State, 507; The State *v.* Bott, 31 La. An. 663; Gabel *v.* Houston, supra.

amounting to Nuisance; III. Connecting other Offences with this, IV. Remaining and Connected Questions.

I. *By what Acts particular Statutory Provisions are violated.*

§ 953. **In what Terms the Statutes.** — The language of our statutes is not entirely uniform; but, in general, they provide in varying words against the doing of ordinary labor or business on the Lord's day, excepting from this provision works of necessity and charity.

Inhibition — Exception. — Of course, then, a transaction, to be indictable, must fall within the general inhibition; and must not, within the exception. If, at either point, it fails, it is not prohibited by the statute. Let us first look at the —

§ 954. **General Inhibition.** — There are various forms of it, but of substantially one meaning. Thus —

"Common Labor" — (Trading — Contracting). — The words of the Ohio enactment are "common labor;" and they are held to include "trading, bartering, selling, or buying any goods, wares, or merchandise."[1] The making of a promissory note on Sunday was adjudged, in Indiana, to be "common labor," rendering it void.[2] But in Nebraska, the contrary is held of a Sunday contract.[3] It is unsettled whether the mere selling of two cigars on Sunday is "common labor," where such is not the defendant's avocation.[4] If within his usual avocation, it is an offence to sell a single cigar,[5] or "two quarts of beer."[6]

[1] Cincinnati *v.* Rice, 15 Ohio, 225. See Bloom *v.* Richards, 2 Ohio State, 387; Sellers *v.* Dugan, 18 Ohio, 489.

[2] Reynolds *v.* Stevenson, 4 Ind. 619. **"Ordinary Calling."** — In Georgia, a promissory note made on Sunday, but not within the "ordinary callings" of the party, is not void under the statute of 1762. Sanders *v.* Johnson, 29 Ga. 526. **"Work or Servile Labor."** — In New York, an agreement to publish an advertisement in a newspaper issued on Sunday has been adjudged void, and the price not recoverable by suit. Smith *v.* Wilcox, 25 Barb. 341. In another New York case, Ingraham, P. J., said: "It [the statute] prohibits work or servile labor, and the exposure to sale of merchandise, except certain articles of food. Making a contract or agreement is not forbidden." Therefore it was held that a benevolent society might lawfully hold its business meetings and transact its business on Sunday. People *v.* Young Men's &c., Society, 65 Barb. 357. And see Peate *v.* Dickens, 3 Dowl. P. C. 171; Rex *v.* Whitmash, 7 B. & C. 596; Begbie *v.* Levi, 1 Cromp. & J. 180; post, § 968.

[3] Hoaacck *v.* Keobler, 5 Neb. 355.

[4] Wetzler *v.* The State, 18 Ind. 416. See Drury *v.* Defontaine, 1 Taunt. 131; Scarfe *v.* Morgan, 4 M. & W. 270, 1 Horn & H. 292.

[5] Foltz *v.* The State, 33 Ind. 215.

[6] Eitel *v.* The State, 33 Ind. 201, criticising Wetzler *v.* The State, supra.

"Worldly Employment" — (Driving Omnibus). — In Pennsylvania, the driving of an omnibus, as a public conveyance, is held to be a "worldly employment," not lawful on this day.[1]

§ 955. **Acts unlawful on other Grounds.** — We shall see, by and by,[2] that a particular act may be a violation both of the Sunday law and of another provision either of the common or statutory law. But, in matter of mere interpretation of the statute, —

Gaming. — The Indiana court held, that gaming cannot be deemed "common labor," or one's "usual avocation." It "is," said Davison, J., "an offence defined by statutory law — it is a criminal act — the doing of which on any day of the week is forbidden; and it seems to us that an act thus forbidden cannot be held to be an act of common labor or of usual avocation."[3] But, —

Liquor Selling. — Where there is no general prohibition, in any statute, of the sale of intoxicating liquor, and it is therefore lawful for a person to make such selling his "usual avocation," if then a statute forbids "common labor" on the Lord's day, a liquor seller, selling on that day, though but in a single instance, violates the statute.[4]

§ 956. **"Labor, Business, Work."** — The Massachusetts statute has the words "any manner of labor, business, or work;" and it is held that —

Making Will. — The execution of a will does not come within the inhibition, so as to render the will void. Not every thing pertaining to earthly affairs is "labor, business, or work." For example, —

Marrying. — "A contract of marriage," said the learned judge, "is a purely civil contract. . . . Yet no one would contend that it would be unlawful for a civil magistrate to complete the execution of such a contract by joining parties in matrimony on the Sabbath, or that a contract of marriage entered into before and

[1] Johnston *v.* Commonwealth, 10 Harris, Pa. 102; Commonwealth *v.* Jeandell, 2 Grant, Pa. 506. See Commonwealth *v.* Nesbitt, 10 Casey, Pa. 398; Commonwealth *v.* Jacobus, 1 Leg. Gaz. Rep. 491; Rex *v.* Middleton, 4 D. & R. 824, 3 B. & C. 154; Sandiman *v.* Breach, 7 B. & C. 96, 9 D. & R. 796; Augusta, &c. Railroad *v.* Renz, 55 Ga. 126.

[2] Post, § 966.

[3] The State *v.* Conger, 14 Ind. 396, 397.

[4] Voglesong *v.* The State, 9 Ind. 112. See post, § 961, 966.

solemnized by a magistrate would be invalid because the act was done on the Lord's day."[1] But —

Journeying to a Market. — Travelling to market on the Sabbath, in order to be ready to supply customers on Monday morning, is within these statutory terms.[2]

§ 957. **Employment of like Class.** — In "Statutory Crimes,"[3] we saw that, when 29 Car. 2, c. 7, § 1, forbade any "tradesman, artificer, workman, laborer, or *other person* whatsoever," to exercise his ordinary calling on the Lord's day, —

Farmer. — This was held not to extend to a farmer:[4] because it could do so only by force of the words "any other person whatsoever," and these are limited in construction to persons of like classes with those specifically enumerated. This sort of interpretation is applied in various other particulars.[5]

§ 958. **Evident Meaning.** — And, in general terms, these statutes are to be so construed as not to make acts criminal which plainly they were not meant to prohibit.[6] Therefore —

Baking. — The statute just mentioned was held not to forbid the baking of puddings and pies for dinner on Sunday; though, on the other hand, it was deemed to be a violation of the statute for a baker to bake bread in the ordinary course of his business.[7]

Driving to Church. — And in Pennsylvania it has been adjudged not to be in violation of the act of 22d April, 1794, for a hired domestic servant to drive his employer's family to church;[8] while yet, as we have seen,[9] the driving of an omni-

[1] Bennett *v.* Brooks, 9 Allen, 118, 122, opinion by Bigelow, C. J.

[2] Jones *v.* Andover, 10 Allen, 18.

[3] Stat. Crimes, § 245.

[4] Reg. *v.* Cleworth, 4 B. & S. 927.

[5] Bennett *v.* Brooks, 9 Allen, 118.

[6] Stat. Crimes, § 231–240.

[7] Rex *v.* Younger, 5 T. R. 449; Rex *v.* Cox, 2 Bur. 785. Hawkins observes: "It is said to have been agreed by the court, that an indictment will lie on this statute [Stat. 29 Car. 2, c. 7] against a baker for baking loaves of bread or rolls on the Lord's day in the usual way of his trade, because that is not a work of necessity; but that it will not lie for baking puddings, pies, or meat for dinners; for the Sabbath is more likely to be generally observed by a baker staying at home to bake the dinners of a number of families, than by his going to church, and those families or their servants staying at home to dress dinners for themselves; and this sort of exercise of a trade not only falls within the exception of 'works of necessity and charity,' but is also within the proviso, as being for this purpose a cook's shop; it being as reasonable that a baker should bake for the poor, as that a cook should roast or boil for them." 1 Hawk. P. C. Curw. ed. p. 360, § 8.

[8] Commonwealth *v.* Nesbit, 10 Casey 398.

[9] Ante, § 954.

bus, as a public conveyance, is held, in the same State, to be unlawful.[1]

Shaving Customers. — Perhaps, in like manner, it would not be unlawful for a private barber to shave his master on Sunday; but, in England,[2] and in Pennsylvania,[3] it has been adjudged so for a barber to shave customers in the ordinary way.

§ 959. **Works of Necessity and Charity.** — But these statutes except out of their general inhibition "works of necessity and charity." What are such works, it is not easy to lay down by rule. The "necessity" is not absolute and physical.[4] Perhaps the connection of this word with "charity" may mollify the construction. Work to prevent a great waste of property is held to come within this exception. For example, —

Saving Sap. — If a man has a maple sugar orchard, he may gather and even boil his sap on Sunday, when he cannot otherwise prevent its waste.[5]

Malting Barley. — It takes ten days to malt barley. "After four days, the barley is drawn on a kiln to dry; and, while there, it must be turned four times each day for two days; the third, three times, when it is out of much danger." And this turning of it, on Sunday, has been held to be within the exception of the statute, not subjecting the party to indictment.[6]

Gathering Sea-weed. — On the other hand, it is held in Massachusetts that the gathering of sea-weed at ten o'clock of a Sunday evening, at low tide, on a secluded beach, does not come within this exception, though the sea-weed is in danger of being washed away and lost by the next flood tide.[7] We may doubt

[1] See also Scully *v.* Commonwealth, 11 Casey, 511.

[2] Phillips *v.* Innes, 4 Cl. & F. 234.

[3] Commonwealth *v.* Jacobus, 1 Leg. Gaz. Rep. 491.

[4] See Vol. I. § 350–355; post, § 960; and the note following the next.

[5] Whitcomb *v.* Gilman, 35 Vt. 297; Morris *v.* The State, 31 Ind. 189.

[6] Crocket *v.* The State, 33 Ind. 416, Ray, C. J., observing: "In Massachusetts, in Commonwealth *v.* Knox, 6 Mass. 76, as early as the beginning of the present century, Chief Justice Parsons recognized the principle that any labor necessary, by which, he says, 'cannot be understood *physical* necessity,' but such labor as is necessary to accomplish a lawful object, under the circumstances of any particular case, cannot be considered as against the prohibition of the statute. So in McGatrick *v.* Wason, 4 Ohio State, 566, it was held, that 'the necessity may grow out of, or, indeed, be incidental to, a particular trade or calling.' Clearly, in the case in judgment, it is such an incident."

[7] Commonwealth *v.* Sampson, 97 Mass. 407, Hoar, J., observing: "It is not easy to give a precise rule for cases of this kind, some of which come very near the line. The definition which has been given of the phrase 'works of necessity or charity,' that it 'comprehends all acts

whether the courts in all our States will follow a doctrine which thus forbids the saving of property. Again, —

Preventing Stoppage of Mills. — The same court held, that the clearing out of a wheel-pit, to prevent the stoppage of mills employing many hands, is not a work of "necessity or charity," which can be lawfully done on the Sabbath.[1]

§ 960. **Travelling — (The Mails — Passenger).** — The driver of a coach, carrying the United States' mail in pursuance of a contract with the postmaster-general, does not, it is held in Massachusetts, violate this statute; though a passenger who rides in the coach does. The constitution of the United States would probably protect the driver, even if the statute were in terms adverse. But, the judge added, "travelling, when from necessity, is not prohibited by that section. By necessity, cannot be understood physical necessity; for a case in which any man is physically obliged to travel can hardly be imagined. But a moral fitness or propriety of travelling, under the circumstances of any particular case, may be deemed necessity within this section; and *a fortiori*, when the travelling is necessary to execute a lawful contract, it cannot be considered as unnecessary travelling against the prohibition of the statute. . . . But let it be remembered, that our opinion does not protect travellers in the stage-

which it is morally fit and proper should be done on the Sabbath,' may itself require some explanation. **Save Life, Property, prevent Suffering.** — To save life, or prevent or relieve suffering, and this in the case of animals as well as men; to prepare needful food for man and beast; to save property, as in the case of fire, flood, or tempest, or other unusual peril, would unquestionably be acts which fall within the exception. But it is no sufficient excuse for work on the Lord's day, that it is more convenient or profitable if then done than it would be to defer or omit it. Jones *v.* Andover, 10 Allen, 18. . . . **Wreck.** — If a vessel had been wrecked upon the beach, it would have been lawful to work on Sunday for the preservation of property which might be lost by delay. **Fish.** — But if the fish in the bay or the birds on the shore happen to be uncommonly abundant on the Lord's day, it is equally clear that it would furnish no excuse for fishing or shooting on that day. **Whale.** — How it would be if a whale happened to be stranded on the shore, we need not determine. Whether a case wholly exceptional, and involving a large amount of accessible value, would require any modification of the rule, is not now in question. The deposit of sea-weed upon the shore by the waves, if not constant, is frequent. It is not property which has been reduced into possession, and afterward been exposed to loss or hazard. There was no certainty, or strong probability, that equally good opportunities of gathering it would not often recur on other days. The collecting of it on the beach as it is found there from time to time is one of the ordinary branches of agricultural labor." p. 409, 410. See ante, § 877.

[1] McGrath *v.* Merwin, 112 Mass. 467.

coach, or the carrier of the mail in driving about any town to discharge or to receive passengers; and much less in blowing his horn, to the disturbance of serious people, either at public worship or in their own houses. The carrier may proceed with the mail on the Lord's day to the post-office; he may go to any public-house to refresh himself and his horses; and he may take the mail from the post-office and proceed on his route. Any other liberties on the Lord's day our opinion does not warrant."[1]

Other Travelling. — The travelling which will be protected on Sunday as "necessary" must be on a real, not fancied, necessity; recognized by the law, and not resting merely in the belief of the party.[2] Thus, —

To procure Change of Hours. — A travelling by one to induce his master to change his hours of labor from the night to the day, that he may sleep better, is not a work either of "necessity or charity."[3] But —

Procure Medicine. — It is otherwise of a travelling to procure medicine for a sick yet convalescent child.[4] So —

Visit to Father. — It is a filial duty, and not forbidden, the Pennsylvania court has held, for a son to travel on Sunday to visit his father in the country.[5]

§ 961. **Sale of Liquor by Taverners on Sunday.** — The Pennsylvania statute of 1794 is in the following words: "If any person shall do or perform any worldly employment or business whatever on the Lord's day, commonly called Sunday, works of necessity and charity only excepted, or shall use or practise any unlawful game, hunting, shooting, sport, or diversion whatsoever on the same day, and be convicted thereof, every such person so offending shall, &c. *Provided always*, that nothing herein contained shall be construed to prohibit the dressing of victuals in private families, bakehouses, lodging-houses, inns, and other houses of entertainment, for the use of sojourners, travellers, or strangers, or to hinder watermen from landing their passengers, or ferrymen

[1] Commonwealth *v.* Knox, 6 Mass. 76, opinion by Parsons, C. J. And see United States *v.* Hart, Pet. C. C. 390; Flagg *v.* Millbury, 4 Cush. 243. See also Murray *v.* Commonwealth, 12 Harris, Pa. 270.

[2] Johnson *v.* Irasburgh, 47 Vt. 28. Running Street Cars, in cities and their vicinity, has been adjudged a work of necessity. Augusta, &c. Railroad *v.* Renz, 55 Ga. 126.

[3] Connolly *v.* Boston, 117 Mass. 64.

[4] Gorman *v.* Lowell, 117 Mass. 65. As to selling the medicine, see Reg. *v.* Howarth, 33 U. C. Q. B. 537.

[5] Logan *v.* Mathews, 6 Barr, 417, 420. See also Commonwealth *v.* Nesbit, 10 Casey, Pa. 398.

from carrying over the water travellers or persons removing with their families on the Lord's day, commonly called Sunday, nor to the delivery of milk or the necessaries of life before nine o'clock in the forenoon, nor after five of the clock in the afternoon of the same day." And the court has held, that the keeper of a tavern violates this statute, if he sells on the Sabbath intoxicating liquors to a traveller, or to a temporary sojourner.[1] But in Delaware, under the former statute of the latter State, the contrary was decided.[2]

§ 962. **Exposing Goods for Sale, &c.** — In Missouri, "exposing to sale any goods, wares, or merchandise; keeping open any ale or porter house, grocery, or tippling-shop; and selling or retailing any fermented or distilled liquor, on the first day of the week, commonly called Sunday," — were made punishable. Under this provision, the acts, it was held, must have been done for the accommodation of customers, and have been in continuation of the usual occupation of the week.[3]

§ 963. **Keep open Shop.** — A statute punishing a person who "shall keep open his shop, warehouse, or workhouse" on the Lord's day, is violated though the door be not actually left open, if the occupant is within ready to do business, and there is no obstruction to persons entering.[4]

§ 964. "**Traveller.**" — To make a person a "traveller," within the English statute of 18 & 19 Vict. c. 118, § 2, it is not necessary he should be journeying on business. "Of course, a man could not be said to be a traveller who goes to a place merely for the purpose of taking refreshment. But if he goes to an inn for refreshment in the course of a journey, whether of business or of

[1] Omit *v.* Commonwealth, 9 Harris, Pa. 426. So also in Tennessee, The State *v.* Eskridge, 1 Swan, Tenn. 413. According to a Pennsylvania case, the sale of liquors on Sunday, by a licensed innkeeper, is not an indictable offence under the acts of 11th March, 1834, and 16th April, 1849. The only penalty incurred by such a sale is that imposed by the act of 1794, forbidding worldly employments on the Lord's day. Commonwealth *v.* Naylor, 10 Casey, 86.

[2] Hall *v.* The State, 4 Harring. Del. 132. See ante, § 955; Hudson *v.* Geary, 4 R. I. 485; Reg. *v.* Whiteley, 3 H. & N. 143; Commonwealth *v.* Naylor, 10 Casey, 86. See The State *v.* Benjamin, 2 Oregon, 125.

[3] The State *v.* Crabtree, 27 Misso. 232. See ante, § 954.

[4] Commonwealth *v.* Harrison, 11 Gray, 308; Commonwealth *v.* Lynch, 8 Gray, 384. "It is not to be doubted," said Metcalf, J., in the last-cited case, "that any shop is kept open, on any day of the seven, when it is kept perfectly accessible to those who wish to enter it, and the owner or his servant or agent, is within, ready to do business." p. 385. See also Koop *v.* People, 47 Ill. 327.

pleasure, he is entitled to demand refreshment, and the innkeeper is justified in supplying it."[1] Persons walking in a town on a Sunday morning to enjoy the country air, and taking refreshment at an inn, though only two miles from their residence, are "travellers."[2]

II. *Repetitions amounting to Nuisance.*

§ 965. **General View.** — The reader will find something on this subject in "Criminal Procedure."[3] Aside from what is there laid down, it has been held in Pennsylvania, on a *habeas corpus* hearing before a single judge, that, —

Multiplicity of Acts. — Though one act of Sabbath-breaking is punishable by a fine, there may be such a succession of acts, of the same sort, as will amount to a public nuisance indictable and abatable. Thus, —

Public Conveyance. — The driving of a public conveyance, for hire, on Sunday, is a violation of the act of 1794, inflicting the penalty of four dollars for performing worldly employment on the "Lord's day, commonly called Sunday." But, as a further consequence, the running of cars on passenger railroads on Sunday being, by reason of the noise accompanying them, a disturbance of the peace of the Sabbath, and the rights of worship and of rest, the drivers of such cars may be arrested and held for a breach of the peace.[4]

[1] Atkinson *v.* Sellers, 5 C. B. N. S. 442, 448, Cockburn, C. J.

[2] Taylor *v.* Humphries, 17 C. B. N. S. 539. And see 10 C. B. N. S. 429. See further, as to who is a "traveller," Fisher *v.* Howard, 10 Cox C. C. 144; Leslie *v.* Lewiston, 62 Maine, 468; Hinckley *v.* Penobscot, 42 Maine, 89.

[3] Crim. Proced. II. § 812 et seq.

[4] Commonwealth *v.* Jeandell, 2 Grant, Pa. 506. The judge, Thompson, observed: "When worldly employment is carried on in such a manner, and in such places, as to disturb the public peace and quiet, and the religious exercises of a community, either at home or in churches, or places of public worship, and it may not or cannot be restrained by the imposition of the defined penalty in the act, do not such circumstances constitute a breach of the public peace of the Sabbath, and may not the offender or offenders be held to bail to keep the peace? . . . Travelling, or riding for recreation, is not a breach of the Sabbath, and persons may not be arrested for riding along the street for such purposes. The disturbance, if any, occasioned by the vehicle, would be but for an instant, and not soon recurring. This is very unlike in character the carrying of passengers in a vehicle along the same route every six minutes, as was intended by the company on the day the arrest was made. . . . The penalty imposed by the act of 1794 is for the performance of worldly employment — a punishment for the act. The offence complained of here is the disturbance of the public peace; and the worldly employment, the kind and man-

III. *Connecting other Offences with this.*

§ 966. **Same Act both Sabbath-breaking and other Crime.** Though the commission of crime cannot be deemed "common labor,"[1] unless what is done is of a sort to be such in spite of its criminality;[2] still, if a statute against Sabbath-breaking in terms forbids a thing, the thing does not cease to be Sabbath-breaking though it should also be prohibited by some other statute. Thus, —

Open Shop and Selling Liquor. — Where a statute had made penal the keeping open of a shop on the Lord's day, "for the purpose of doing business therein," it was held that a defendant violated it, though what he did consisted in selling liquor contrary to the inhibitions of another statute.[3]

§ 967. **Nuisance.** — It is but repeating what in point of legal principle has been already said,[4] to state, that one by the repetitions of sales of liquor on Sunday, where each sale is a violation of a statute, may make his premises a nuisance, and be indictable likewise on this ground.[5]

IV. *Remaining and Connected Questions.*

§ 968. **Contracts.** — Some of the foregoing questions arose in civil actions on contract, but the judgments are equally binding in criminal cases. Further adjudications on contract are referred to in the note.[6]

ner of it, is only evidence of the offence charged. It is not covered by the act of 1794." p. 508–511. And see Vol. I. § 1119–1121.

[1] Ante, § 955.

[2] See, for illustration, Wetzler *v.* The State, 18 Ind. 35.

[3] Commonwealth *v.* Trickey, 13 Allen, 559. See Hingle *v.* The State, 24 Ind. 35; Morris *v.* The State, 47 Ind. 503; Harman *v.* The State, 11 Ind. 311.

[4] Ante, § 965.

[5] The State *v.* Williams, 1 Vroom, 102; Commonwealth *v.* Shea, 14 Gray, 386.

[6] See Bloom *v.* Richards, 2 Ohio State, 387; Hooper *v.* Edwards, 25 Ala. 528; Stackpole *v.* Symonds, 3 Fost. N. H. 229; Smith *v.* Wilcox, 19 Barb. 581; Hilton *v.* Houghton, 35 Maine, 143; Richardson *v.* Kimball, 28 Maine, 463; Sellers *v.* Dugan, 18 Ohio, 489; Goss *v.* Whitney, 27 Vt. 272; Bryant *v.* Biddeford, 39 Maine, 193; Hussey *v.* Roquemore, 27 Ala. 281; Mohney *v.* Cook, 2 Casey, 342; Varney *v.* French, 19 N. H. 233; Slade *v.* Arnold, 14 B. Monr. 287; Greene *v.* Godfrey, 44 Maine, 25; Adams *v.* Gay, 19 Vt. 358; Northrup *v.* Foot, 14 Wend. 248; Jordan *v.* Moore, 10 Ind. 386; Broome *v.* Wellington, 1 Sandf. 664; Bosley *v.* McAllister, 13 Ind. 565; Way *v.* Foster, 1 Allen, 408; Miller *v.* Roessler, 4 E. D. Smith, 234; Sherman *v.*

Judicial Proceedings, &c. — There is in the books much law concerning arrests, recognizances entered into, and judicial proceedings conducted on Sunday. But these discussions do not seem quite in place here. Some cases appear in a note.[1]

Other Points. — Some other points, relating to the subject of this chapter, remain; but not of interest to justify a particular examination of them here.[2]

§ 969. **Conscientious Observers of another Day.** — These statutes extend their penalties by interpretation to persons who conscientiously keep, as their Sabbath, another day of the week.[3] But some of them contain express provisions for the protection of such persons.[4]

§ 970. **The Intent.** — To violate these statutes requires no particular criminal intent, other than simply to do the thing which they forbid.[5] The various doctrines explained in the first volume are applicable. Thus, —

Mistake of Fact. — If one, without fault or carelessness,[6] lets on the Sabbath a carriage believing it is to be used for a work of necessity or charity, while in fact it is not so used, he does not thereby become guilty of crime.[7] And one authorized to sell liquor on Sunday to travellers, but forbidden to sell to others,

Roberts, 1 Grant, Pa. 261; Stryker *v.* Vanderbilt, 3 Dutcher, 68; Bumgardner *v.* Taylor, 28 Ala. 687; Robeson *v.* French, 12 Met. 24; Rainey *v.* Capps, 22 Ala. 288.

[1] Nabors *v.* The State, 6 Ala. 200; Bland *v.* Whitfield, 1 Jones, N. C. 122; Cory *v.* Silcox, 5 Ind. 370, 373; The State *v.* Schnierle, 5 Rich. 299; Chapman *v.* The State, 5 Blackf. 111; Keith *v.* Tuttle, 28 Maine, 326; Blood *v.* Bates, 31 Vt. 147; Harris *v.* Morse, 49 Maine, 432; True *v.* Plumley, 36 Maine, 466; The State *v.* Suhur, 33 Maine, 539; Pearce *v.* Atwood, 13 Mass. 324; Langabier *v.* Fairbury, &c., Railroad, 64 Ill. 243 Johnston *v.* People, 31 Ill. 469; Davis *v.* Fish, 1 Greene, Iowa, 406; Chapman *v.* The State, 5 Blackf. 111; Rosser *v.* McColly, 9 Ind. 587; McCorkle *v.* The State, 14 Ind. 39; Joy *v.* The State, 14 Ind. 139; Mayo *v.* Wilson, 1 N. H. 53; Webber *v.* Merrill, 34 N. H. 202, 209; Watts *v.* Commonwealth, 5 Bush, 309; Rice *v.* Commonwealth, 3 Bush, 14; Bass *v.* Irvin, 49 Ga. 436; Commonwealth *v.* Marrow, 3 Brews. 402; Blood *v.* Bates, 31 Vt. 147; Taylor *v.* Phillips, 3 East, 155.

[2] See Commonwealth *v.* Newton, 8 Pick. 234; The State *v.* Meyer, 1 Speers, 305; The State *v.* Helgen, 1 Speers, 310; Hall *v.* The State, 3 Kelly, 18; The State *v.* Williams, 4 Ire. 400; The State *v.* Brooksbank, 6 Ire. 73; The State *v.* Goff, 20 Ark. 289; Hudson *v.* Geary, 4 R. I. 485.

[3] Specht *v.* Commonwealth, 8 Barr, 312; Commonwealth *v.* Hyneman, 101 Mass. 30. And see Stansbury *v.* Marks, 2 Dall. 213.

[4] Commonwealth *v.* Trickey, 13 Allen, 559; Commonwealth *v.* Hyneman, supra.

[5] Shover *v.* The State, 5 Eng. 259; Brittin *v.* The State, 5 Eng. 299.

[6] Vol. I. § 313 et seq.

[7] Myers *v.* The State, 1 Conn. 502.

should not be convicted if, when he sold it, he believed on good reason that he was supplying refreshment to a traveller, though in fact the person was not a traveller.[1]

[1] Taylor *v.* Humphries, 17 C. B. N. S. 355–359, 632, 663–665, 730, 820–825, 877, 539; Vol. I. § 303; Stat. Crimes, § 132, 1021, 1022.

For LOTTERIES, see Stat. Crimes.
MAGISTRATE, see MALFEASANCE AND NON-FEASANCE IN OFFICE.
MAIM, see MAYHEM.
MAINTENANCE, see CHAMPERTY AND MAINTENANCE.

CHAPTER XXIX.

MALFEASANCE AND NON-FEASANCE IN OFFICE.[1]

§ 971. Introduction.
972–977. Justices of the Peace and the like.
978, 979. Sheriffs and the like.
980–982. Some Miscellaneous Topics.

§ 971. **First Volume — This Chapter, and how divided.** — In the preceding volume,[2] we took a general view of the duty of officers in respect of their official trusts, and how far their neglect or refusal of it renders them indictable. In this chapter, we are simply to consider something of the application of elementary doctrines to, I. Justices of the Peace and other like Officers; II. Sheriffs and other like Officers; after which we shall look at III. Some Miscellaneous Topics.

I. *Justices of the Peace and other like Officers.*

§ 972. **Criminal Responsibility of Inferior Magistrates.** — We have seen,[3] that, according to the more common doctrine, justices of the peace and other inferior magistrates may be holden criminally for malfeasance, even in respect of their judicial conduct. Most of the cases in the English books concern the granting of —

Criminal Information. — In this, the court acts on its discretion as well as the law; and, though it cannot grant an information where an indictment would not lie, it may refuse one. As foundation for an information, —

Corruption. — The court requires evidence of something more than a mere mistake concerning their duty; it requires corrup-

[1] For matter relating to this title, see Vol. I. § 218, 239, 299, 316, 321, 459–464, 707. See this volume, BRIBERY; PRISON BREACH, &c. And see Stat. Crimes, § 568, 805, 806, 828, 969. For the pleading, practice, and evidence, see Crim. Proced. II. § 819 et seq.

[2] See the places referred to in the last note, and particularly § 459–464.

[3] Vol. I. § 462.

tion.[1] Corruption, also, is necessary to sustain an indictment;[2] but more exactly how this is we shall see further on.[3]

§ 973. **Instances of Informations granted.** — Informations have been granted against a justice of the peace for convicting defendants without summons;[4] for refusing an ale-house license from motives of resentment;[5] for sending a man to the house of correction without cause;[6] for declining to administer an oath, as the statute required him to do;[7] for discharging a prisoner on insufficient bail;[8] for bailing a felon;[9] for otherwise admitting to bail where he had no authority;[10] for refusing bail, or particular persons as such;[11] for adding to an order, requiring the concurrence of two justices, the name of a second one;[12] for making a false return to a mandamus;[13] for sitting as magistrate in a case in which he was personally interested;[14] and for some other improper acts and omissions.[15]

§ 974. **Instances of Indictments.** — Indictments have been maintained, for issuing a warrant where there was no complaint and proceeding under the same;[16] for discharging an offender without sufficient sureties;[17] for not attempting to suppress a riot.[18]

[1] Rex *v.* Halford, 7 Mod. 193; Rex *v.* Hann, 3 Bur. 1716; Rex *v.* Jackson, 1 T. R. 653; Reg. *v.* Badger, 7 Jur. 216, 12 Law J. N. S. M. C. 66; Anonymous, 16 Jur. 995, 14 Eng. L. & Eq. 151; Rex *v.* Cotten, W. Kel. 125; Rex *v.* Baylis, 3 Bur. 1318; Rex *v.* Rye Justices, Say. 25; Rex *v.* Seaford Justices, 1 W. Bl. 432; Rex *v.* Williamson, 3 B. & Ald. 582; Rex *v.* Jackson, Lofft, 147; Rex *v.* Lancashire Justices, 1 D. & R. 485; Rex *v.* Cozens, 2 Doug. 426; In re Fentiman, 4 Nev. & M. 126, 2 A. & E. 127; Rex *v.* Davie, 2 Doug. 588; Rex *v.* Corbett, Say. 267; Reg. *v.* Badger, 6 Jur. 994; Rex *v.* Friar, 1 Chit. 702; Rex *v.* Borron, 3 B. & Ald. 432.

[2] Vol. I. § 462; The State *v.* Porter, 2 Tread. 694; Commonwealth *v.* Rodes, 6 B. Monr. 171; Lining *v.* Bentham, 2 Bay, 1; The State *v.* Johnson, 2 Bay, 385; The State *v.* Gardner, 2 Misso. 23; Jones *v.* People, 2 Scam. 477. See The State *v.* Leigh, 3 Dev. & Bat. 127; The State *v.* Lenoir Justices, 4 Hawks, 194.

[3] Post, § 976; Vol. I. § 299.

[4] Rex *v.* Allington, 1 Stra. 678. See Rex *v.* Cotten, W. Kel. 125; The State *v.* Odell, 8 Blackf. 396.

[5] Rex *v.* Hann, 3 Bur. 1716; Rex *v.* Williams, 3 Bur. 1317. See Rex *v.* Athay, 2 Bur. 653; People *v.* Norton, 7 Barb. 477.

[6] Rex *v.* Okey, 8 Mod. 45.

[7] Smith *v.* Langham, Skin. 60, 61.

[8] Rex *v.* Lediard, Say. 242; Respublica *v.* Burns, 1 Yeates, 370. See Reg. *v.* Tracy, 6 Mod. 179.

[9] Rex *v.* Clarke, 2 Stra. 1216.

[10] Rex *v.* Brooke, 2 T. R. 190.

[11] Reg. *v.* Badger, 6 Jur. 994. See Rex *v.* Jones, 1 Wils. 7.

[12] Rex *v.* Howard, 7 Mod. 307.

[13] Anonymous, Lofft, 185.

[14] Rex *v.* Davis, Lofft, 62.

[15] Rex *v.* Fielding, 2 Bur. 719; Rex *v.* Phelps, 2 Keny. 570; Rex *v.* Wykes, Andr. 238; Anonymous, Lofft, 44. See also Rex *v.* Stukely, 12 Mod. 493.

[16] Wallace *v.* Commonwealth, 2 Va. Cas. 130.

[17] People *v.* Coon, 15 Wend. 277.

[18] Respublica *v.* Montgomery, 1 Yeates, 419; Reg. *v.* Neale, 9 Car. & P.

§ 975. **Whether Indictment properly Maintainable.** — As already observed,[1] it is not quite universally held, that justices of the peace are liable to an indictment, even for official corruption, in respect of their judicial proceedings. Certainly there is reason in declining to cast upon their shoulders, as judges of the inferior courts, a heavier burden than is borne by the judges of the superior. If the law subjects them, as it does the higher judges, to impeachment for official misconduct, this should be enough in the first instance, leaving them to be indicted, if this proceeding is also to be resorted to, after they are disrobed of office. But it is believed that the relations of these officers to the law differs somewhat in the different States, therefore that no one enunciation of doctrines would be good as applied in every locality.

§ 976. **Ministerial distinguished from Judicial.** — Inferior magistrates, like justices of the peace, have duties of a ministerial sort; and, in reason, and it is believed in authority, they may be punishable for malfeasance or non-feasance in respect of such a duty, where they would not be if it were judicial. Thus, —

Corruption, again. — When one who was both mayor and justice of the peace was on trial for the neglect of not suppressing a riot, Littledale, J., said to the jury: "Mere good feeling, or upright intentions, are not sufficient to discharge a man if he has not done his duty. The question here is, whether the defendant did all that he knew was in his power, and which would be expected from a man of ordinary prudence, firmness, and activity."[2] But this is plainly not the corruption which would be required to convict a magistrate in respect of judicial misconduct.[3] As to what is corruption in magistrates, Ashhurst, J., once observed: "Though they have denied generally that they acted from any interested motives in the business, yet that is not sufficient; for, if they acted even from passion or from opposition, that is equally corrupt as if they acted from pecuniary considerations."[4] In a South Carolina civil case, where a justice of the peace and a constable were sued jointly for false imprisonment, it was held that they were liable, if, instigated by the magistrate, the constable

431. See also The State *v.* Leigh, 3 Dev. & Bat. 127; The State *v.* Lenoir Justices, 4 Hawks, 194; Rex *v* Pinney, 5 Car. & P. 254.

[1] Ante, § 972; Vol. I. § 462.

[2] Rex *v.* Pinney, 5 Car. & P. 254, 270.

[3] Ante, § 972.

[4] Rex *v.* Brooke, 2 T. R. 190, 195. And see People *v.* Brooks, 1 Denio, 457; The State *v.* Coon, 14 Minn. 456.

executed a warrant of arrest for felony nine months after it was issued; the party who procured it in the first instance not having made any recent application to have it executed, and ill-will toward the arrested person having prompted the arrest. Said Grimké, J., "The warrant which had issued nine months before the arrest was stale and insufficient." [1]

§ 977. **Mistake of Law.** — Obviously, if the magistrate mistook the law when he pronounced a judicial judgment, he was not corrupt in fact; yet if, as some of the cases imply,[2] he is not to be deemed, like other men, to have known the law, we have here a very dangerous exception to a necessary general rule.[3] Probably a knowledge of the law must be, at least *prima facie*, presumed.

II. *Sheriffs and other like Officers.*

§ 978. **Criminally responsible.** — The criminal liability of sheriffs and their deputies, constables, coroners, and the like, for malfeasance and non-feasance in office, is clear beyond question.[4] Thus, —

Hue-and-Cry. — In an old case, an indictment was held to lie against a constable for refusing to pursue a hue-and-cry against a burglar; "because it is the constable's duty, upon notice given to him, presently to pursue." [5]

Not receiving and holding Prisoner. — And any like officer is thus amenable for not taking to prison one committed on a magistrate's warrant.[6] So also is the keeper of a jail, for refusing to receive a prisoner.[7]

Non-return of Precept. — And the official person may be punished criminally for the non-return of a precept;[8] but, if his term of office expires before the return day, the consequence is other-

[1] Garvin *v.* Blocker, 2 Brev. 157. And see Guenther *v.* Whiteacre, 24 Mich. 504.

[2] Vol. I. § 299, 462; Hiss *v.* The State, 24 Md. 556; Rex *v.* Brooke, 2 T. R. 190.

[3] Vol. I. § 292 et seq.

[4] Vol. I. § 459; Rex *v.* Harrison, 1 East P. C. 382; Reg. *v.* Wyat, 1 Salk. 380; s. c. nom. Reg. *v.* Wyatt, 2 Ld. Raym. 1189; The State *v.* Berkshire, 2 Ind. 207; Shaw *v.* Macon, 21 Ga. 280.

[5] Crouther's Case, Cro. Eliz. 654.

[6] Reg. *v.* Johnson, 11 Mod. 62. In this case, it was held to be no excuse that the prisoner was kept safely in the officer's own house, and brought before the magistrate for examination at the time required. See also Rex *v.* Mills, 2 Show. 181; Ex parte Taws, 2 Wash. C. C. 353.

[7] Rex *v.* Cope, 7 Car. & P. 720.

[8] Reg. *v.* Wyat, 1 Salk. 380; s. c. nom. Reg. *v.* Wyatt, 2 Ld. Raym. 1189.

wise.[1] Yet, if the guilt were incurred while he was an officer, the indictment may be found afterward.[2]

Statutes. — Both in aid of these doctrines and in extending them, statutes have been enacted in some of our States.[3]

§ 979. **Sheriff for Acts of Deputy.** — Whether a sheriff is answerable criminally for the wrong-doing of his deputy, was considered in the first volume.[4]

III. *Some Miscellaneous Topics.*

§ 980. **Discretionary Functions.** — If an officer's functions are discretionary, he cannot be punished for honestly exercising them by declining to do a thing. Therefore, —

Overseers of Poor. — It being discretionary, in North Carolina,[5] for overseers of the poor to make by-laws and regulations for their comfort, an indictment will not lie for omitting to make them, especially if no corrupt intent is shown.[6]

§ 981. **"District Officer" — (Jailer furnishing Liquor).** — In South Carolina, a jailer is within the statute of 1829, "for the punishment of official misconduct of district officers;" and the furnishing, in large quantities, of spirituous liquors to prisoners in his charge is "official misconduct," subjecting him to criminal liability.[7]

§ 982. **Other Officers.** — Officers other than those mentioned in the foregoing sections of this chapter are liable criminally for their official misconduct.[8] Thus, —

Inspector of Beef. — In Pennsylvania, an inspector of beef is thus liable for refusing to perform his duty.[9]

Selectmen. — (Not commit Civil Wrong). — In New Hampshire, the selectmen of a town are not indictable for neglecting to remove a school-house to a new site, designated by the report of a committee, if such site is not the property of the school-district,

[1] The State *v.* Woodside, 7 Ire. 296.

[2] The State *v.* Sellers, 7 Rich. 368.

[3] The State *v.* Carr, 71 N. C. 106; Barter *v.* Martin, 5 Greenl. 76; The State *v.* Hein, 50 Misso. 362; Pippin *v.* The State, 36 Texas, 696; The State *v.* Bevans, 37 Iowa, 178; Commonwealth *v.* Mitchell, 3 Bush, 30; McBride *v.* Commonwealth, 4 Bush, 331.

[4] Vol. I. § 218.

[5] R. S. c. 87, § 13.

[6] The State *v.* Williams, 12 Ire. 172.

[7] The State *v.* Sellers, 7 Rich. 368.

[8] Rex *v.* Bembridge, 3 Doug. 327. And see Rex *v.* Surrey, 1 Chit. 650.

[9] Commonwealth *v.* Genther, 17 S. & R. 135.

and no steps have been taken to have it laid out as a school lot; for they could not make the removal without committing a civil trespass.[1]

Other Crime. — An officer may commit an ordinary crime, like any other person;[2] but this is not malfeasance in office.

[1] The State *v.* Bailey, 1 Fost. N. H. 185.

[2] Commonwealth *v.* Robinson, 1 Gray, 555. For further cases illustrating the general doctrine of this chapter, see Rex *v.* Hemmings, 3 Salk. 187; Rex *v.* Commings, 5 Mod. 179; Rex *v.* Everett, 2 Man. & R. 35, 8 B. & C. 114; Rex *v.* Barrat, 2 Doug. 465; Rex *v.* Friar, 1 Chit. 702; Mann *v.* Owen, 4 Man. & R. 449, 9 B. & C. 595; Rex *v.* Osborn, 1 Comyns, 240; The State *v.* Leach, 60 Maine, 58; The State *v.* Gardner, 5 Nev. 377; Ex parte Harrold, 47 Cal. 129; Rex *v.* Bull, 1 Wils. 93.

CHAPTER XXX.

MALICIOUS MISCHIEF.[1]

§ 983. Introduction.
984–991. The Property.
992–995. The Act of Mischief.
996–998. The Intent.
999. English Statutes as in Force with us.
1000. Remaining and Connected Questions.

§ 983. **Multifarious.** — The offence of malicious mischief is both common-law and statutory, but chiefly the latter; the statutes are very numerous and diverse; and it is allied to the common-law crime of larceny. Therefore —

First Volume. — A considerable discussion of it could not be omitted from the elementary elucidations in our first volume.

Statutory Crimes. — It being so wide an offence and so largely statutory, it necessarily found a place in "Statutory Crimes."

This Volume. — Being an offence at the common law, a general discussion of it could not be omitted from this volume.

Criminal Procedure. — Therefore a chapter on the pleading, practice, and evidence, corresponding to the present chapter, became necessary in "Criminal Procedure."

Repetitions avoided. — This more than usual division of the discussion, and the insertion of parts of it in so many different places, seems at the first impression objectionable; but a contrary course would have been open to still greater objection. Possibly all reference to the statutes might have been well omitted from this chapter. But what is said here is not said again elsewhere. No substantial repetitions are anywhere permitted.

How defined. — In the first volume, the definition by the North Carolina court was adopted; namely, that malicious mischief at the common law is "the wilful destruction of some article of

[1] For matter relating to this title, see Vol. I. § 429, 568–570, 577, 595, 792. For the pleading, practice, and evidence, see Crim. Proced. II. § 837 et seq. And see, as to both law and procedure, Stat. Crimes, § 156, note, 246, 314, 430–449.

personal[1] property, from actual ill-will or resentment towards its owner."[2]

How the Chapter divided. — We shall consider, I. The Property; II. The Act of Mischief; III. The Intent; IV. English Statutes as in Force with us; V. Remaining and Connected Questions.

I. *The Property.*

§ 984. **Whether extends to Real Estate.** — In the first volume, there is an intimation that perhaps this offence is analogous to larceny, to the extent of exempting real estate from being the subject of it; and on this idea rests the above definition.[3] But the old authorities create a doubt whether the analogy can be carried so far, and many deem that they establish the contrary. Thus (confining ourselves to the old books), —

Defacing Tombs. — Lord Coke says, that the defacing of tombs, sepulchres, or monuments for the dead, "is punishable by the common law;"[4] while still they are real estate. Also —

Copper from Buildings. — The old doctrine is plain, that tearing up and carrying away copper fixed to the freehold is a common-law misdemeanor.[5] Again, —

Muniments of Title. — It is a misdemeanor at the common law to steal a record which concerns the realty,[6] but it is not larceny.[7] Moreover, as distinguishing malicious mischief from larceny, —

Chose in Action. — It has been held to be indictable to tear an account stated and settled between parties, — a proposition of law, however, the correctness of which has been doubted.[8]

§ 985. **To what Property under American Authorities.** — In this country, the decisions concerning even the indictability of malicious mischief are not uniform;[9] so likewise are they not uniform on the question now under consideration. The New York court has maintained, that all kinds of property, real and personal, may be the subject of this offence.[10] On the other hand, the doctrine in Maine is, that an indictment at the common law will not lie

[1] Query as to the word "personal." See post, § 984.
[2] Vol. I. § 569.
[3] Vol. I. § 569, 577.
[4] 3 Inst. 202.
[5] Rex v. Joyner, J. Kel. 29.
[6] Rex v. Westbeer, 2 Stra. 1133, 1 Leach, 4th ed. 12.
[7] Ante, § 770.
[8] Reg. v. Crisp, 6 Mod. 175 and note.
[9] Vol. I. § 569.
[10] Loomis v. Edgerton, 19 Wend. 419

for cutting and girdling fruit-trees;[1] and in North Carolina, that it cannot be supported for "unlawfully, wickedly, and maliciously" cutting and destroying a quantity of standing Indian corn.[2] So the New Jersey court has refused to uphold a prosecution for taking up and removing a corner-stone in the boundary line between two estates, with intent to injure the owner of one of them.[3] But an indictment is held to lie for maliciously, wickedly, and wilfully killing a cow, the property of another;[4] also, a dog;[5] also, a horse;[6] also, for poisoning cattle;[7] also, charging that the defendant "unlawfully, wickedly, maliciously, and mis-

[1] Brown's Case, 3 Greenl. 177.

[2] The State *v.* Helmes, 5 Ire. 364. And see The State *v.* Robinson, 3 Dev. & Bat. 130.

[3] The State *v.* Burroughs, 2 Halst. 426. The court say: "The offence charged is exclusively a private injury, and in no way concerns the public further than any other private wrong. The cases cited from Burrow [Rex *v.* Wheatly, 2 Bur. 1125; Rex *v.* Storr, 3 Bur. 1698; Rex *v.* Atkyns, 3 Bur. 1706] are strongly in point." See also Commonwealth *v.* Powell, 8 Leigh, 719.

[4] People *v.* Smith, 5 Cow. 258.

[5] The State *v.* Latham, 13 Ire. 33. **Further of Dogs.** — The same under a statute which has the words "any property." The State *v.* Sumner, 2 Ind. 377. So also in New Hampshire, Fowler, J., observing: "We do not deem it material to the decision of the question before us, whether dogs are or are not the subject of larceny. Admitting, that, by our laws, they are not, it by no means follows that they may not be the subject of the wilful and malicious injury punished by the act under which the present indictment was found. The evident design of that act was to afford more effectual protection against injuries to property under aggravated circumstances, by punishing, as criminal offences, acts which before its passage had been regarded only as civil injuries. And we can see no reason why the property of its owner in a valuable dog is not quite as deserving of protection against the wilful and malicious injury of the reckless and malignant, as property in fruit, shade, or ornamental trees, whether standing in the garden or yard of their owner, or in a public street or square, or any other species of personal property." The State *v.* McDuffie, 34 N. H. 523, 527. On the other hand, as dogs, ante, § 773, are not the subjects of larceny at the common law, the Virginia court held, that the killing of a dog is not within the malicious-mischief statute, the words of which are, "any tree already cut, or any other timber, or property, real and personal, belonging to another," &c. Commonwealth *v.* Maclin, 3 Leigh, 809. In like manner, in Minnesota, during the time of the territory, a dog was adjudged not to be within the words "horse, cattle, or other beast." United States *v.* Gideon, 1 Minn. 292. And see Stat. Crimes, § 246, note, 344, 443, 548.

[6] The State *v.* Council, 1 Tenn. 305; Respublica *v.* Teischer, 1 Dall. 335. **Indictable Acts enumerated.** — In the last-mentioned case, the court observed: "The poisoning of chickens; cheating with false dice; fraudulently tearing a promissory note, and many other offences of a similar description; . . . breaking windows by throwing stones at them, though a sufficient number of persons were not engaged to render it a riot; and the embezzlement of public moneys, have, likewise, in this State," been held to be indictable. See also The State *v.* Landreth, 2 Car. Law Repos. 446.

[7] Commonwealth *v.* Leach, 1 Mass. 59.

chievously did set fire to, burn, and consume one hundred barrels of tar," &c.[1]

§ 986. **Under Statutes.** — Under statutes, English and American, a wide range has been given to this offence. And thus almost every species of property, real and personal, has been made the subject of it. For example, the words "cattle,"[2] "beast,"[3] "stack,"[4] "threshing-machine,"[5] "public property,"[6] "trees,"[7] and a great variety of other words, have been employed.

§ 987. **"Woods."** — A North Carolina statute has the term "woods;" and the court has held, that it includes an old field which has been "turned out," without fencing around it, and broom sedge and pine bushes have grown up in it, and it is surrounded by forest land; consequently a person setting fire to such a field incurs the statutory penalty.[8]

§ 988. **"Other Property."** — In Virginia it was enacted, that "any person who shall, &c., destroy or injure any tree already cut, or any other timber or property, real or personal, belonging to another," &c., — shall be indictable. And the court held, that the words "other timber or *property*" are not limited in construction to property of the kind before mentioned;[9] but they cover domestic animals, like hogs.[10]

§ 989. **Property obtained by Wrong.** — Under the statute of Maine, it is held to be unimportant whether the property came

[1] The State *v.* Simpson, 2 Hawks, 460.

[2] 2 East P. C. 1074; Reg. *v.* Tivey, 1 Car. & K. 704, 1 Den. C. C. 63; Rex *v.* Austen, Russ. & Ry. 490; The State *v.* Abbott, 20 Vt. 537; Rex *v.* Haywood, 2 East P. C. 1076, Russ. & Ry. 16; Rex *v.* Chapple, Russ. & Ry. 77. See Frierson *v.* Hewitt, 2 Hill, S. C. 499; United States *v.* Mattock, 2 Sawyer, 148. **Buffalo.** — In Missouri it has been held, that a buffalo, though domesticated, does not come within the word "cattle." The State *v.* Crenshaw, 22 Misso. 457.

[3] Taylor *v.* The State, 6 Humph. 285.

[4] Stat. Crimes, § 216; Rex *v.* Salmon, Russ. & Ry. 26; Commonwealth *v.* Erskine, 8 Grat. 624; Commonwealth *v.* Macomber, 3 Mass. 254; Reg. *v.* Spencer, Dears. & B. 131, 7 Cox C. C. 189.

[5] Rex *v.* Mackerel, 4 Car. & P. 448; Rex *v.* Fidler, 4 Car. & P. 449; Rex *v.* West, 2 Deac. Crim. Law, 1687; Rex *v.* Chubb, 2 Deac. Crim. Law, 1687; Rex *v.* Barlett, 2 Deac. Crim. Law, 1687; Rex *v.* Hutchins, 2 Deac. Crim. Law, 1686.

[6] Read *v.* The State, 1 Ind. 511, Smith, Ind. 369.

[7] The State *v.* Moultrieville, 1 Rice, 158; Reg. *v.* Whiteman, Dears. 353, 23 Law J. N. S. M. C. 120, 18 Jur. 434, 25 Eng. L. & Eq. 590.

[8] Hall *v.* Cranford, 5 Jones, N. C. 3. And see Averitt *v.* Murrell, 4 Jones, N. C. 322.

[9] Stat. Crimes, § 245, 246; ante, § 957.

[10] Commonwealth *v.* Percavil, 4 Leigh, 686.

by right or by wrong to the hand of the person injured.[1] This, we have seen,[2] is the rule also in larceny.

§ 990. **"Field of Owner."** — A statute in North Carolina made it punishable, "if any person shall unlawfully and on purpose kill, maim, or injure any live stock running at large in the range or in the field or pasture of the owner;" and it was held not to be within the statute for a man to injure stock found in his own field, which was enclosed and under cultivation.[3]

Trespassing Cattle. — On the other hand, the words of the Illinois statute being, "shall unlawfully, wantonly, wilfully, or maliciously kill, wound, disfigure, or destroy any horse, mare," &c.; the court held, that the owner of land has no right to kill or injure cattle trespassing upon it, and if he does, he is liable under the statute for malicious mischief.[4]

§ 991. **Injuries to Person.** — There are various statutes affording protection to the person of individuals, — perhaps not properly falling within our present title. The most important are against malicious shooting,[5] and malicious stabbing,[6] cutting,[7] and wounding.[8] The reader will find some points of interest in the cases cited.[9]

II. *The Act of Mischief.*

§ 992. **At the Common Law.** — It is not possible to draw, with minute precision, a line which shall show the act necessary to constitute malicious mischief, and no more. Still it must be some damage to the property, of a nature serious, and worthy of the law's notice.

Wounding Animal. — East says: "An indictment at the common law which charged, that the prisoner, 'on the 23d of May, &c., with force and arms, at, &c., one black gelding of the value of £30, of the goods and chattels of William Collyer, then and there

[1] The State *v.* Pike, 33 Maine, 361. And see The State *v.* Davis, 2 Ire. 153.

[2] Ante, § 781.

[3] The State *v.* Waters, 6 Jones, N. C. 276.

[4] Snap *v.* People, 19 Ill. 80.

[5] Stat. Crimes, § 322; 1 East P. C. 412; Reg. *v.* Lewis, 9 Car. & P. 523; Reg. *v.* St. George, 9 Car. & P. 483; Henry *v.* The State, 18 Ohio, 32; Rex *v.* Reynolds, Russ. & Ry. 465; Rex *v.* Voke, Russ. & Ry. 531; Reg. *v.* Murphy, 1 Crawf. & Dix C. C. 20; Trimble *v.* Commonwealth, 2 Va. Cas. 143; Rex *v.* Holt, 7 Car. & P. 518.

[6] Stat. Crimes, § 315.

[7] Stat. Crimes, § 315; Rex *v.* Fraser, 1 Moody, 419; Rex *v.* Hunt, 1 Moody, 93.

[8] Stat. Crimes, § 314; Reg. *v.* Walker, Dears. 358, 25 Eng. L. & Eq. 589.

[9] See also post, § 1004.

being, then and there unlawfully did maim, to the great damage of Collyer, and against the peace,'" &c., was held by the judges to be inadequate; "for, if the case were not within the Black Act, the fact in itself was only a trespass; for the words *vi et armis* did not imply force sufficient to support an indictment."[1] And the New Jersey court, on a careful examination of the authorities, which it considered not to be uniform, held, that malicious mischief in wounding an animal without killing it, is not an indictable offence either by the New Jersey statute or at the common law.[2] On principle, such wounding, viewed as mere torture to the creature,[3] could not constitute the mischief meant by the common law; but, if it had proceeded so far as to impair the value of the animal as property, it should be deemed adequate. The mischief done to a building in tearing copper from it, or a tomb in defacing it,[4] is a mere wounding, not a killing, of the building or the tomb.

§ 993. **Wife.** — A wife cannot commit this offence on her husband's property.[5]

§ 994. **Under Statutes.** — The act of mischief required by the statutes will appear from their terms, and from discussions in "Statutory Crimes." In England, we have the act of demolishing or beginning to demolish a house,[6] setting fire to various property,[7] damaging it,[8] wounding,[9] and the like.

§ 995. **"Disfigure."** — With us it has been held, that to cut the hair from the tail of a horse, or to cut off his mane, is to "disfigure" the horse.[10]

Alter. — A statute which, to protect the owners of cattle in respect of the marks put upon them, forbids the "altering" of a brand, is violated when a new brand is impressed upon a cow already branded.[11]

[1] Ranger's Case, 2 East P. C. 1074.

[2] The State *v.* Beekman, 3 Dutcher, 124; s. p. The State *v.* Manuel, 72 N. C. 201.

[3] Vol. I. § 594–597; Stat. Crimes, § 1093.

[4] Ante, § 984.

[5] Anonymous, 6 Mod. 88.

[6] Stat. Crimes, § 214; Vol. I. § 340; Reg. *v.* Howell, 9 Car. & P. 437; Reg. *v.* Harris, Car. & M. 661, note; Rex *v.* Batt, 6 Car. & P. 329; Rex *v.* Thomas, 4 Car. & P. 237; Rex *v.* Price, 5 Car. & P. 510; Reg. *v.* Adams, Car. & M. 299; Reg. *v.* Simpson, Car. & M. 669.

[7] Stat. Crimes, § 311; Rex *v.* Salmon, Russ. & Ry. 26.

[8] Stat. Crimes, § 313, note.

[9] Stat. Crimes, § 216, 314; Lemon *v.* The State, 19 Ark. 171.

[10] Boyd *v.* The State, 2 Humph. 39.

[11] Linney *v.* The State, 6 Texas, 1. See The State *v.* Matthews, 20 Misso. 55; The State *v.* Nichols, 12 Rich. 672.

"Matter or Thing." — And a statute against "knowingly and wilfully packing or putting into any bag, bale, or bales of cotton, any stone, wood, trash-cotton, cotton seed, or any matter or thing whatsoever, or causing the same to be done, to the purpose or intent of cheating or defrauding any person or persons whomsoever," embraces, the South Carolina court has held, the putting in of an undue quantity of water.[1]

III. *The Intent.*

§ 996. **Malice against Owner.** — The meaning of the word "malice" was stated in the preceding volume.[2] Now, the act, in malicious mischief, must proceed from malice;[3] and, according to the general doctrine, the malice must be against the owner of the property, not against another person, or against the property itself; it not being, for instance, sufficient where a man kills an animal out of an ill mind toward it.[4]

To prevent Repetition of Trespass. — Where, in North Carolina, the jury found that the defendant, indicted for stabbing a mare, "took the mare from his corn-field, where she was damaging his growing corn, to a secret part of the county, where he inflicted the wound, with a view to prevent a repetition of the injury," — the malice was held not to be adequate. The judge deemed that the act, in this offence, must be "done in a spirit of wanton malignity, without provocation or excuse, and under circumstances which bespeak a mind prompt and disposed to the com-

[1] The State *v.* Holman, 3 McCord, 306.

[2] Vol. I. § 427, 429.

[3] 1 East P. C. 412; The State *v.* Council, 1 Tenn. 305; Commonwealth *v.* Walden, 3 Cush. 558; The State *v.* Doig, 2 Rich. 179.

[4] Vol. I. § 595; 2 East P. C. 1072; Rex *v.* Austen, Russ. & Ry. 490; The State *v.* Robinson, 3 Dev. & Bat. 130; The State *v.* Pierce, 7 Ala. 728; The State *v.* Jackson, 12 Ire. 329; Rex *v.* Pearce, 1 Leach, 4th ed. 527, 2 East P. C. 1072; Rex *v.* Kean, 2 East P. C. 1073; s. c nom. Rex *v.* Hean, 1 Leach, 4th ed. 527, note; Rex *v.* Shepherd, 1 Leach, 4th ed. 539, 2 East P. C. 1073; The State *v.* Wilcox, 3 Yerg. 278; United States *v.* Gideon, 1 Minn. 292; The State *v.* Enslow, 10 Iowa, 115, 117; Northcot *v.* The State, 43 Ala. 330; Hobson *v.* The State, 44 Ala. 380; Hill *v.* The State, 43 Ala. 335; The State *v.* Newby, 64 N. C. 23. Contra, in Georgia, where it is deemed sufficient that the act be wantonly and recklessly done. Mosely *v.* The State, 28 Ga. 190. As to the construction of the Alabama statute, see Johnson *v.* The State, 37 Ala. 457. For a fuller view of the malice required under the statutes, see Stat. Crimes, § 433–437.

mission of mischief."[1] Possibly not all our courts would require the malice to go quite so far.[2]

§ 997. **How under Statutes.** — This question is discussed in "Statutory Crimes."[3] In England, it has been made immaterial by statute, "whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed, or otherwise."[4]

§ 998. **Mischief under Claim of Right.** — Plainly, if the mischief is done under a claim of right, the offence is not committed;[5] the same principle applying here as in larceny.[6]

IV. *English Statutes as in Force with us.*

§ 999. **General View.** — There are many English statutes of malicious mischief, some of which are of an early date; but no one of them can, on very clear principles, confidently be said to be common law in this country.[7]

In South Carolina. — In a South Carolina case the court observed: "We have of force the Statute 37 Hen. 8. c. 6. against burning of frames, and the Statute 22 & 23 Car. 2. c. 7. against the burning of any stack, house, building, or kiln, maliciously in the night-time; but not Stat. 9 Geo. 1. c. 22, commonly called the Black Act."[8] This result, however, comes from express legislation.

Black Act. — The Black Act of 9 Geo. 1 has been held not to be common law in Georgia.[9]

[1] The State *v.* Landreth, 2 Car. Law Repos. 446, opinion by Taylor, C. J.

[2] There is, however, a series of cases stated 2 East P. C. 1072 et seq., which appear to go fully as far as this North Carolina decision. See also Stat. Crimes, § 437; Taylor *v.* Newman, 4 B. & S. 89, 9 Cox C. C. 314.

[3] Stat. Crimes, § 433–437.

[4] 7 & 8 Geo. 4, c. 30, § 25; Reg. *v.* Tivey, 1 Car. & K. 704, 1 Den. C. C. 63, decided on that statute and on 7 & 8 Geo. 4, c. 30, § 16, and 7 Will. 4 & 1 Vict. c. 90, § 2; 2 Russ. Crimes, 3d Eng. ed. 544; 1 Gab. Crim. Law, 685. See also Rex *v.* Salmon, Russ. & Ry. 26; Rex *v.* Hunt, 1 Moody, 93; Commonwealth *v.* Walden, 3 Cush. 558. The present statute is 24 & 25 Vict. c. 97, § 58. Stat. Crimes, § 434.

[5] 2 Russ. Crimes, 3d Eng. ed. 545; Goforth *v.* The State, 8 Humph. 37; The State *v.* Newkirk, 49 Misso. 84; The State *v.* Hause, 71 N. C. 518; Palmer *v* The State, 45 Ind. 388; The State *v.* Luther, 8 R. I. 151; Taylor *v.* Newman, 4 B. & S. 89, 9 Cox C. C. 314; Hobson *v* The State, 44 Ala. 380.

[6] Ante, § 851.

[7] Stat. Crimes, § 431. Mr. East has made a full collection of them, as see 2 East P. C. 1036 et seq.

[8] The State *v.* Sutcliffe, 4 Strob. 372, 397; The State *v.* DeBruhl, 10 Rich. 23.

[9] The State *v.* Campbell, T. U. P. Charl. 166; Stat. Crimes, § 432.

V. *Remaining and Connected Questions.*

§ 1000. **Felony or Misdemeanor.** — This offence, at the common law, is misdemeanor, not felony.[1] In some of our States, under statutes, it is felony; in others, misdemeanor,[2] — a question on which the practitioner should consult the statutes of his own State.

[1] Ante, § 512; Black *v.* The State, 2 Md. 376.

[2] Black *v.* The State, 2 Md. 376; Commonwealth *v.* Macomber, 3 Mass. 254; Britton *v.* Commonwealth, 1 Cush. 302; Trimble *v.* Commonwealth, 2 Va. Cas. 143.

For MALICIOUS WOUNDING, see ante, § 991; post, MAYHEM; also, Stat. Crimes.
MALPRACTICE, see Vol. I. § 217, 314, 558, 896; and this Vol. CONTEMPT; HOMICIDE.
MANSLAUGHTER, see HOMICIDE.
MARRIAGE LAWS, see Stat. Crimes, and Bishop on Mar. and Div.

CHAPTER XXXI.

MAYHEM AND STATUTORY MAIMS.[1]

§ 1001. **How defined.** — The common-law offence of mayhem is defined, in the language of Hawkins, to be "a hurt of any part of a man's body whereby he is rendered less able, in fighting, either to defend himself or to annoy his adversary."[2]

[1] For matter relating to this title, see Vol. I. § 257, 259, 513, 935. See this volume, ASSAULT; BATTERY; HOMICIDE. For the pleading, practice, and evidence, see Crim. Proced. II. § 851 et seq. And see, for both law and procedure, Stat. Crimes, § 316, 447, 448, 495–498, 505.

[2] 1 Hawk. P. C. Curw. ed. p. 107, § 1. And see Vol. I. § 259; Stat. Crimes, § 316; 1 East P. C. 393; Reg. *v.* Hagan, 8 Car. & P. 167, 171. **Proposed in New York.** — The New York commissioners propose the following definition: "Every person who, with premeditated design to injure another, inflicts upon his person any injury which disfigures his personal appearance, or disables any member or organ of his body, or seriously diminishes his physical vigor, is guilty of maiming." And they add: **Concerning the Definition.** — "Definitions of mayhem found in several of the more familiar English authorities confine the offence to such wounds as impair the powers of attack or defence; the gravamen of the offence being deemed to consist in the disability for self-protection which it creates. Consult 4 Bl. Com. 205, 150; 1 Inst. § 502. [**Nature of the Offence.** — I apprehend, that, according to the authorities here referred to, and to the teachings of the books generally, the gravamen of a mayhem, at the common law, was not so much that the person maimed was unable to protect himself, viewed simply in respect of self-preservation, as that he was unable to fight in defence of the king and country, and, as a soldier, protect himself on the field of battle. And see Vol. I. § 259, 513; Stat. Crimes, § 316.] Earlier authorities, however, are to be found, giving the word a more extended signification. Thus, Pulton (De Pace Regis, 1609, fol. 15, § 58 and 59) says: 'Maiheming is when one member of the commonweale shall take from another member of the same a natural member of his bodie, or the use and benefit thereof, and thereby disable him to serve the commonweale by his weapons in the time of warre, or by his labor in the time of peace; and also diminisheth the strength of his bodie, and weaken him thereby to get his owne living, and by that meanes the commonweale is in a sort deprived of the use of one of her members.' Wounds which merely disfigured the person without inpairing the general strength or the powers of some particular member seem to have been excluded by all the common-law definitions of mayhem; though made the subject of several stringent enactments." Draft of a Penal Code, p. 89, 90.

2. I cannot forbear citing a little further from Pulton, at the place above referred to by the New York commissioners: "This maiheming is a dismembring of a man, or taking away some member, or part of his bodie, or the use thereof: as when a wound, blow, or hurt is given, or done by one person or more to another person, whereby he is

Disfiguring and Mayhem distinguished. — East says: "If the injury be such as disfigures him only, without diminishing his corporal abilities, it does not fall within the crime of mayhem.

the lesse able to defend himselfe in the time of warre, or to get his living in time of peace; and, therefore, **What Acts are Mayhem.** — If a man do put out the eye, or cut off the hand, or foot, or any joynt of the hand or foot of another, it is maihem, though it be done by chaunce-meddly. (But if one man of malice pretended [prepensed?] do cut out the tongue, or put out the eyes of any of the king's subjects, it is felony.) And if one man doe crush the mouth or head of another, or breake out his foreteeth, it is maihem, for with them he may defend himselfe in battaile; but to break his hinder teeth, or to cut off his nose, or ears, whereby he looseth his hearing, is no maihem, but a deformitie, or blemish of his bodie, and no weakening of his strength. It is a maihem to pull any bone out of a man's hand, or to cut off any finger of a man's hand, or to breake any of them, so that they become shrunke up, or dried up, or dead, or crooked. Gelding of a man is also a maihem; though it be in a secret place, yet it maketh him more feeble, and unable to defend himselfe in battaile, or to worke for his living. If by any wound received the sinewes or veines of a man be shrunke up, it is a maihem. To cut off the cheeke or jawbone of any person, or so to crush or breake any of them that the same person is the lesse able to take his meat or drinke, is a maihem. If one person or more doe take another person by force, and put him in the stockes, or otherwise bind him fast, and after pour so much skalding hote oyle and vinegar, or hote melted lead, or other skalding liquor, upon any part of his bodie, and so continue it untill it doth wast and consume the flesh of the same part, and drie up and mortifie the vaynes and sinews of the same part, it is a maihem. If A doe strike at B, and the weapon wherewith he striketh, breaking or falling out of his hand by the force of the blow, doth put out the eyes of D, this shall be adjudged a maihem, for that A hath an intention at the first to doe some hurt in striking at B. The greatnesse or smalnesse of the wound in some of the cases aforesaid doth make the difference, whether it be a maihem or not."

3. **Felony or Misdemeanor.** — The reader perceives, that this old author singles out one instance of mayhem, and calls it felony, without giving a special designation to the other instances. And we shall see, in the text, before we close this chapter, that there is some confusion in the books as to whether, at the common law, mayhem is to be deemed a felony or a misdemeanor. Now, if we were to trace the matter fully through all the old books and records, we should probably find, that, according to the ancient common law, some maims were deemed to be felonies; others, misdemeanors; while to others there was assigned a special place between felony and misdemeanor. But however this may be, **Blending with Battery.** — When the maim was a misdemeanor, and it was punished purely as a violation of the criminal law, the question was of but little consequence whether it was regarded technically as a mayhem, under this particular name, or as an aggravated battery, which was also a misdemeanor. Therefore the line separating the lesser mayhems from batteries, as the law has come to us, is, most naturally, not very distinct.

4. **Mayhem as Civil Tort.** — But there is another distinction, namely, between the civil offence of mayhem, viewed simply as a tort against the individual, and for which damages in money might be demanded, and the indictable crime. Now, if the reader will read on, in Pulton, beyond the place whence the above passages are extracted, he will see that the mayhem of which this author is particularly treating is such as was punishable by the old and now obsolete process of **Appeal of Mayhem**; and, says Jacob, Law Dict. tit. Appeal, "Appeal of mayhem is the accusing one that hath maimed another:

Upon this distinction, the cutting off, disabling, or weakening a man's hand or finger, or striking out an eye [1] or foretooth, or castrating him, or, as Lord Coke adds, breaking his skull, are said to be maims; but the cutting off his ear or nose are not such at common law." [2]

§ 1002. **Old English Statutes.** — There are, on this subject, some old English statutes, a part of which seem, on principle, to belong to our common law. Yet they are not deemed either by Kilty [3] or the Pennsylvania judges [4] to have been received by us. They are stated by East as follows: —

5 Hen. 4. — "By Stat. 5 Hen. 4, c. 5, to remedy a mischief which then prevailed of beating, wounding, imprisoning, or maiming persons, and after purposely 'cutting their tongues or putting out their eyes' to prevent them from giving evidence against the perpetrators, it is enacted, that 'in such case the offenders that so cut tongues or put out the eyes of any, and that duly proved and found that such deed was done of malice prepensed, shall incur the pain of felony.' That is, as Lord Coke explains it, if the act be done voluntarily and of set purpose, however sudden the occasion.[5]

37 Hen. 8. — "By Stat. 37 Hen. 8, c. 6, if any person 'maliciously, willingly, or unlawfully cut or cause to be cut off the ear or ears of any subject, otherwise than by authority of law, chance-medley sudden affray, or adventure, he shall not only forfeit treble damages to the party grieved, to be recovered by action of trespass, but shall forfeit £10 to the king for every such offence, in the name of a fine.'" [6]

Statutes imposing Forfeiture. — We may observe, that old Eng-

but, this being generally no felony, it is in a manner but an action of trespass; and nothing is recovered by it but damages." Pulton, however, fol. 16, after saying, that "an appeale of maihem is in effect but an action of trespass, wherein the plaintiffe shall recover damages according to the qualitie and quantitie of the offence," adds, "and the defendant shall be imprisoned." But as showing that the appeal is pretty purely a civil action, he mentions, fol. 17, that a plea of release of all demands, by the plaintiff, will avail the defendant in bar. See post, § 1008, note.

5. **Further of the Definition.** — The consideration, therefore, that Pulton is speaking of the semi-civil wrong, not of the purely criminal offence, reconciles the apparent discrepancy, pointed out by the New York commissioners, between his definition of mayhem, and the definitions of the more modern and standard writers on the criminal law.

[1] Chick *v.* The State, 7 Humph. 161.

[2] 1 East P. C. 393; Britton, Kel. Tr. 165.

[3] Kilty Report of Statutes, 53, 77, 95.

[4] Report of Judges, 3 Binn. 595 et seq.

[5] See post, § 1006.

[6] 1 East P. C. 393, 394.

lish statutory provisions, like this latter one, imposing a mere forfeiture to the party and to the king, are not commonly deemed to be in force in this country.[1]

§ 1003. **Coventry Act.** — The remaining statute, mentioned by East, is later in date than the first settlements here; but sufficiently early to be common law in some of them, within the rule that the law of the mother country when a colony is settled becomes the law of the colony as far as applicable to its circumstances.[2] It is 22 & 23 Car. 2, c. 1 (A.D. 1670), "commonly called the Coventry Act, from the circumstance of its having passed on occasion of an assault made on Sir John Coventry in the street, and slitting his nose, by persons who lay in wait for him for that purpose, in revenge, as was supposed, for some obnoxious words uttered by him in Parliament. It enacts, 'that, if any person or persons shall, on purpose and of malice aforethought, by laying in wait, unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any subject; with intention, in so doing, to maim or disfigure him in any the manners before mentioned; that then the person or persons so offending, their counsellors, aiders, and abettors, knowing of and privy to the offence as aforesaid, shall be declared to be felons, and suffer death as in cases of felony without benefit of clergy.' But not to work corruption of blood, forfeiture of dower, or of the lands or goods of the offender."[3] The meaning of the words "slit the nose,"[4] with some others in this statute, is explained in "Statutory Crimes."[5]

§ 1004. **American Legislation.** — Our own legislation is modelled chiefly on the English, but it is not in all particulars alike in our several States. Something of it, and how interpreted, will appear from the cases in the note.[6]

[1] See also, on the question of these statutes being in force in this country, ante, § 999.

[2] Bishop First Book, § 51–56.

[3] 1 East P. C. 394.

[4] Stat. Crimes, § 317.

[5] A full exposition of this statute is given by East. See also 1 Hawk. P. C. Curw. ed. p. 108, l 9.

[6] The State *v.* Abram, 10 Ala. 928; The State *v.* Simmons, 3 Ala. 497; The State *v.* Briley, 8 Port. 472; The State *v.* Absence, 4 Port. 397; Eskridge *v.* The State, 25 Ala. 30; The State *v.* Coleman, 5 Port. 32; Adams *v.* Barrett, 5 Ga. 404; Commonwealth *v.* Newell, 7 Mass. 245; The State *v.* Girkin, 1 Ire. 121; The State *v.* Crawford, 2 Dev. 425; The State *v.* Mairs, Coxe, 453; Scott *v.* Commonwealth, 6 S. & R. 224; Chick *v.* The State, 7 Humph. 161; Commonwealth *v.* Lester, 2 Va. Cas. 198; Moore *v.* The

§ 1005. **"Maim" — Consent.** — In "Statutory Crimes," was considered the meaning of the word "maim;"[1] and, in the preceding volume, the effect of a maiming of one's self, or another at his request,[2] with some other points.

§ 1006. **"Malice aforethought."** — The words "malice aforethought," in these statutes, do not require premeditation.[3]

"Premeditated Design." — The words of the New York statute are, instead of "malice aforethought," as in the Coventry Act.[4] "from premeditated design."[5] These words are of a somewhat different meaning; and it follows from views presented under the title "Homicide,"[6] that, under this statute, there must be a specific intent to maim, but it need not be in the mind for any appreciable space of time before the blow is given.[7]

§ 1007. **"Biting off the Ear."** — To constitute a biting off of the ear, the whole ear need not be taken away; if enough is removed to impair the personal appearance, and render the individual less comely, no more is required; but not less will do.[8]

"Member." — The external ear is a "member" of the human body.[9] The Texas doctrine, however, would seem to be, that the court could not say this as matter of law, but the jury may find it as fact,[10] where the word "ear" is not in the statute.

§ 1008. **Felony or Misdemeanor.** — Hawkins says: "It is to be observed, that all *maim* is felony. It is said, that anciently castration was punished with death, and other maims with the loss of member for member. But afterwards no maim was punished in any case with the loss of life or member, but only with fine and imprisonment."[11] And Mr. East observes: "All maims are said to be felony; because anciently the offender had judgment of the loss of the same member, &c., which he had occasioned to

State, 4 Chand. 168; United States *v.* Scroggins, Hemp. 478; The State *v.* Bohannon, 21 Misso. 490; Foster *v.* People, 50 N. Y. 598. And see ante, § 991.

[1] Stat. Crimes, § 314, 316. And see The State *v.* Briley, 8 Port. 472.

[2] Vol. I. § 260, 513.

[3] Ante, § 1002; The State *v.* Girkin, 1 Ire. 121; The State *v.* Crawford, 2 Dev. 425; The State *v.* Simmons, 3 Ala. 497. As to "wilfully" see The State *v.* Abram, 10 Ala. 928.

[4] Ante, § 1003.

[5] Stat. Crimes, § 496.

[6] Ante, § 728.

[7] Foster *v.* People, 50 N. Y. 598; Godfrey *v.* People, 63 N. Y. 207; Burke *v.* People, 4 Hun, 481. See Slattery *v.* The State, 41 Texas, 619; Molette *v.* The State, 49 Ala. 18.

[8] The State *v.* Girkin and The State *v.* Crawford, 2 Dev. 425; The State *v* Abram, 10 Ala. 928.

[9] Godfrey *v.* People, 5 Hun, 369.

[10] Slattery *v.* The State, 41 Texas, 619.

[11] 1 Hawk. P. C. Curw. ed. p. 107, § 3. And see Vol. I. § 935.

the sufferer; but now the only judgment which remains at common law is of fine and imprisonment; from whence the offence seems to have been afterwards considered more in the nature of an aggravated trespass. Lord Coke accordingly classes it as an offence 'under all felonies deserving death, and above all other inferior offences.' But particular statutes have extended both the crime and the punishment." [1] In this country, the common-law offence of mayhem is not generally considered to be a felony, unless committed by castration, and then perhaps it is.[2]

[1] 1 East P. C. 393.

[2] Commonwealth *v.* Newell, 7 Mass. 245; Adams *v.* Barrett, 5 Ga. 404; Commonwealth *v.* Lester, 2 Va. Cas. 198. And see The State *v.* Absence, 4 Port. 397. But see The State *v.* Thompson, 30 Misso. 470; Canada *v.* Commonwealth, 22 Grat. 899. See also ante, § 1001, note. I am inclined to think that some of the obscurity in the books as to what was the old law has arisen from a failure to distinguish between the cases in which the proceeding was by *appeal* (now abolished in England and never known in this country), and by suit in the king's name, as by indictment or information. Britton, who writes in the name of the king, says: "Concerning mayhems, we are content that the maimed shall sue by appeals of felony against the offenders, and when any appellee is convicted of such felony, and brought up for judgment, let the judgment be this, that he lose the like member as he has destroyed of the plaintiff; and, if the plaint be made against a woman who has deprived a man of his members, she shall have judgment to lose a hand, being the member wherewith she committed the offence. In this felony no prosecution shall lie at our suit with a view to the judgment of loss for loss; but if the appeal be abated, the felons shall answer for such felonies, and if they are attainted at our suit, they shall be awarded to prison, and ransomed thence for breaking our peace." 1 Nichols Trans. 122.

For MEETING, ILLEGAL, see UNLAWFUL ASSEMBLY; also, DISORDERLY HOUSE, Vol. I. § 1106 et seq.
MISCHIEF, see MALICIOUS MISCHIEF.
MURDER, see HOMICIDE.
NOXIOUS TRADES, see Vol. I, § 1138 et seq.
NUISANCE, see Vol. I. § 1071 et seq.
OBSCENE LIBEL, see ante, § 943, 944.

CHAPTER XXXII.

OBSTRUCTING JUSTICE AND GOVERNMENT [1]

§ 1009. **Scope of this Chapter.** — The first volume contains a general exposition of the principles which determine the indictability of acts. In that exposition, we examined the topic of this chapter to an extent which leaves little to be added.[2]

§ 1010. **"Resist or oppose."** — A statute of Alabama provides, that, "if any person shall knowingly resist or oppose any officer of this State, in serving, or attempting to serve, or execute, any legal writ or process whatsoever," he shall be punished in a way pointed out. This requires an active opposition; merely taking charge of a debtor's property, keeping it out of the officer's view, and refusing, when called on by the officer, to produce it, is not enough.[3]

§ 1011. **"Impede or Hinder."** — In Vermont, it is by statute punishable "if any person or persons shall impede or hinder any officer, judicial or executive, civil or military, under the authority of the State, in the execution of his office." In construing which, the court held, that, if a man takes from a justice of the peace a writ and refuses to give it back, thereby stopping proceedings in the cause, he does not commit the statutory offence, whatever may be his common-law liability.[4]

Assault on Officer. — One mode of resisting or impeding an officer is to assault him while in the execution of his office.[5] If the assault is in opposing a lawful arrest by the officer without a

[1] For matter relating to this title, see Vol I. § 340, 440, 457, 458, 468, 688, 696, 697; and see this Vol. PRISON BREACH, RESCUE, AND ESCAPE; and Stat. Crimes, § 216, 223, 570. For the pleading, practice, and evidence, see Crim. Proced. II. § 879 et seq.

[2] See Vol. I. § 450 et seq.

[3] Crumpton *v.* Newman, 12 Ala. 199. And see Johnson *v.* The State, 30 Ga. 426; The State *v.* Moore, 39 Conn. 244; The State *v.* Welch, 37 Wis. 196; Commonwealth *v.* Tobin, 108 Mass. 426.

[4] The State *v.* Lovett, 3 Vt. 110. See further, on points of this kind, The State *v.* Hailey, 2 Strob. 73; The State *v.* Henderson, 15 Misso. 486; The State *v.* Noyes, 25 Vt. 415; Reg. *v.* Green, 8 Cox C. C. 441; Commonwealth *v.* Sheriff, 8 Brews. 343.

[5] Ante, § 51.

warrant, it is no defence that the latter, neglecting his duty, did not afterward make complaint against the defendant for the offence for which he was arrested.[1]

§ 1012. **Resisting Attachment of Goods.** — What a man may do in defence of his property was discussed in the first volume.[2] Within certain limits he may maintain possession of his own personal effects by force.[3] And it has been held that the case is not different, though an officer comes to attach them on a writ against a third person.[4] On the other hand, all right forcibly to resist the officer has by other courts been denied; it being deemed, that, in these circumstances, the owner should yield his claim at once to trial by law.[5] Between these extremes the Vermont court holds a middle ground; namely, that the facts which render a stranger guilty of impeding an officer will not necessarily make the owner so, but he may resist by all peaceable means, yet not to personal violence.[6]

§ 1013. **Liberating Impounded Cattle.** — In Georgia it was held, that one breaking a pound, and liberating a cow put there by the city marshal in obedience to a city ordinance, is not within an ordinance punishing those who oppose the marshal in executing ordinances of this sort. Said McDonald, J.: "The act had been completed, and the ordinance executed, before the defendant committed the act which is alleged to have constituted the offence. The breach of the pound was no opposition or interruption of the officer in the execution of the ordinance."[7]

[1] Commonwealth *v.* Tobin, 108 Mass. 426. And see Commonwealth *v.* McGahey, 11 Gray, 194.

[2] Vol. I. § 836 et seq.

[3] Ante, § 520.

[4] Commonwealth *v.* Kennard, 8 Pick. 133; Oliver *v.* The State, 17 Ark. 508.

[5] The State *v.* Richardson, 38 N. H. 208; The State *v.* Fifield, 18 N. H. 34.

[6] The State *v.* Miller, 12 Vt. 437.

[7] Rome *v.* Omburg, 22 Ga. 67, 69.

For OBSTRUCTING RIVERS AND OTHER WAYS, see WAY.
OFFICIAL MISCONDUCT, see MALFEASANCE AND NON-FEASANCE IN OFFICE.
OPEN LEWDNESS, see Stat. Crimes. And see EXPOSURE OF PERSON, Vol. I. § 1125 et seq.
PEDDLING, see Stat. Crimes.

CHAPTER XXXIII.

PERJURY.[1]

§ 1014–1016. Introduction.
1017–1029. The Oath and Tribunal.
1030–1042. Materiality of the Testimony.
1043, 1044. The Testimony as being false.
1045–1048. The Intent.
1049, 1050. English Statutes as Common Law with us.
1051–1053. American Statutes.
1054–1056. Remaining and Connected Questions.

§ 1014. **Distinguished from other Offences.** — If a particular evil act is not perjury, it may still be indictable as some other offence. Thus, —

Statutory Oath false. — In England, the Bills of Sale Acts of 17 & 18 Vict. c. 36, and 29 & 30 Vict. c. 96, having provided for the registering of bills of sale of personal property after the manner of our registry laws as to real estate, and having made "an affidavit of the time of such bill of sale being made or given" a prerequisite to its registry, one swore falsely in his affidavit and was indicted for perjury. "It is clear," said Kelly, C. B., "that the making of such false affidavit is not strictly perjury [it not being in a judicial proceeding or course of justice]. The prisoner, therefore, is not liable to any sentence that can only be pronounced against those guilty of perjury. It is also clear, however, that the taking of a false oath in a case like this, where an affidavit is required for the purposes of a statute, is a misdemeanor at common law, and renders the guilty person liable to punishment for a common-law misdemeanor." Therefore the allegations peculiar to the indictment for perjury were rejected as surplusage; and, the other allegations being sufficient, the defendant was sentenced

[1] For matter relating to this title, see Vol. I. § 320, 437, 468, 564, 589, 734, 942, 974. For the pleading, practice, and evidence, see Crim. Proced. II. § 899 et seq. And see Stat. Crimes, § 129, 183, 378, note, 568, 570–572, 815.

as for the misdemeanor at common law.[1] In the first volume may be seen other illustrations of acts punishable on the same ground as perjury, while in law they are not perjury.[2]

§ 1015. **How defined.** — Perjury is the wilful giving, under oath, in a judicial proceeding or course of justice, of false testimony material to the issue or point of inquiry.[3]

§ 1016. **How the Chapter divided.** — Following this definition, we shall consider, I. The Oath and the Tribunal administering it; II. The Materiality of the Testimony to the Issue or Point of Inquiry; III. The Testimony as being false; IV. The Intent; V. English Statutes as Common Law in our States; VI. American Statutes; VII. Remaining and Connected Questions.

I. *The Oath and Tribunal administering it.*

§ 1017. **Doctrine of this Sub-title.** — What is chiefly to be elucidated under this sub-title is, that the oath must be one required in some judicial proceeding or course of justice, and must be taken substantially in the form directed by law, before an officer authorized to administer it.

§ 1018. **Oath defined.** — "An oath," says Lord Coke, "is an affirmation or denial by any Christian of any thing lawful and

[1] Reg. *v.* Hodgkiss, Law Rep. 1 C. C. 212. Compare this with Tuttle *v.* People, 36 N. Y. 431, where an indictment for perjury was sustained. And see Warner *v.* Fowler, 8 Md. 25; Smith *v.* Myers, 41 Md. 425.

[2] Vol. I. § 468. See also post, § 1029.

[3] The following are some of the definitions of perjury: —

Hawkins. — "Perjury, by the common law, seemeth to be a wilful false oath, by one who, being lawfully required to depose the truth in any proceeding in a course of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not." 1 Hawk. P. C. Curw. ed. p. 429.

Lord Coke. — "Perjury is a crime committed when a lawful oath is ministered by any that hath authority, to any person, in any judicial proceeding, who sweareth absolutely and falsely in a matter material to the issue or cause in question, by their own act, or by the subornation of others." 3 Inst. 164. This definition is followed in substance by Blackstone, 4 Bl. Com. 137; and by Gabbett, 1 Gab. Crim. Law, 791.

Russell — follows Hawkins; only, by what is probably a misprint, he has the words "*court* of justice" instead of "*course* of justice." 2 Russ. Crimes 3d Eng. ed. 596. The same in Bac. Abr. Perjury.

Peters, J. — "Perjury is a corrupt, wilful, false oath, taken in a judicial proceeding, in regard to a matter or thing material to a point involved in the proceeding. The oath must be taken before some officer or court having authority to administer it." Hood *v.* The State, 44 Ala. 81, 86.

Hume — writing of the Scotch law — defines perjury to be the "judicial affirmation of falsehood upon oath." 1 Hume Crim. Law, 2d ed. 360. See also 1 Alison Crim. Law, 465.

honest, before one or more that have authority to give the same, for advancement of truth and right, calling Almighty God to witness that his testimony is true."[1] But it is not necessary that the person to whom the oath is administered should be a Christian, or swear in the Christian form.[2] And in other respects this definition by Coke does not fully accord with modern views. Let it, therefore, be amended, thus: An oath is a solemn asseveration of the truth of a thing, made, by a person under the sanction of his religion, appealing to the Supreme Being, in the presence of one having the civil authority to administer it.

Affirmation. — An affirmation is a modern, statutory device, by which those whose consciences revolt at an oath as an offence to God may, through another form, place themselves in a like position with persons who have taken the oath. It is similar to an oath, but omits the appeal to the Deity, and substitutes the word "affirm" for "swear."

Concerning the Form of the Oath. — Coke proceeds: "An oath is so sacred, and so deeply concerneth the consciences of Christian men, as the same cannot be ministered to any unless the same be allowed by the common law, or by some act of Parliament. Neither can any oath, allowed by the common law, or by act of Parliament, be altered but by act of Parliament. It is called a corporal oath,[3] because he toucheth with his hand some part of the Holy Scripture."[4]

Form of Administering. — The form of administering an oath seems never to have been regarded as essential; but, in practice, it ought to be such as is most binding on the conscience of him who takes it, and to accord with his religious belief.[5] Even if a statute prescribes the uplifting of the hand, and it is taken by laying the hand on the gospels and kissing them, this will be good; the statutory provision being deemed directory only.[6]

[1] 3 Inst. 165.

[2] 2 Hawk. P. C. Curw. ed. p. 609.

[3] **"Corporal Oath."** — In an Indiana case the court held, that the terms "corporal oath" and "solemn oath" are synonymous; and that an oath taken with the hand uplifted is properly described by either term in an indictment for perjury. Jackson *v.* The State, 1 Ind. 184, Smith, Ind. 124; s. p. The State *v.* Norris, 9 N. H. 96, the court observing: "The term corporal oath must be considered as applying to any bodily assent to the oath of the witness."

[4] 3 Inst. 165.

[5] 2 Hawk. P. C. Curw. ed. p. 609; Gill *v.* Caldwell, Breese, 28.

[6] Commonwealth *v.* Smith, 11 Allen, 243, 252. **Kissing the Book.** — If a witness, in taking the oath, by an accident kisses a book not the Evangelists, neither

Conforming to Statutory Oath. — Where the form of the oath is prescribed by statute, the provision is construed as so far directory[1] that a departure from the words, in matter, not of substance, but of form merely, does not exempt the person taking it from the pains of perjury.[2] If, however, the substance of the statute is not followed, no perjury can be assigned of the oath.[3] Thus, —

Testimony in Writing. — If a statute requires certain testimony to be in writing, then if, contrary to this, it is received orally, no indictment for perjury will lie upon it.[4]

Affidavit. — The signature of the affiant is not essential in an affidavit, and perjury may be assigned on it without.[5]

he nor the administering tribunal being aware of the mistake, the oath is still binding. People *v.* Cook, 4 Seld. 67. Kissing the book is not the essence of the oath; and an indictment for administering an unlawful oath may be sustained where the book was not kissed. Rex *v.* Haly, 1 Crawf. & Dix C. C. 199.

[1] See Stat. Crimes, § 255.

[2] The State *v.* Dayton, 3 Zab. 49; Sharp *v.* Wilhite, 2 Humph. 434; The State *v.* Owen, 72 N. C. 605; Edwards *v.* The State, 49 Ala. 334; Faith *v.* The State, 32 Texas, 373; The State *v.* Pile, 5 Ala. 72. And see The State *v.* Shreve, 1 Southard, 297; The State *v.* Keene, 26 Maine, 33; The State *v.* Whisenhurst, 2 Hawks, 458; Reg. *v.* Southwood, 1 Fost. & F. 356; Tuttle *v.* People, 36 N. Y. 431.

Wrong Oath. — The Minnesota statute provides one form of jurors' oath for capital cases, and another for others; and it has been held, that, though the difference is but trivial, a failure to follow the statute vitiates the verdict in a capital case. Maher *v.* The State, 3 Minn. 444. See The State *v.* Davis, 69 N. C. 383; Edmondson *v.* The State, 41 Texas, 496; Sutton *v.* The State, 41 Texas, 513; Bray *v.* The State, 41 Texas, 560; Bawcom *v.* The State, 41 Texas, 189; Morgan *v.* The State, 42 Texas, 224.

Immaterial variance. — Where an indictment alleged that the defendant was sworn to speak "the truth, the whole truth, and nothing but the truth," and the evidence was that he was sworn to tell the whole truth and nothing but the truth, the variance was held to be immaterial. The State *v.* Gates, 17 N. H. 373. The

Scotch Law as to Form. — Alison, in his work on the criminal law of Scotland, says: "Certain formalities are required in the administration of oaths; and it is indispensable that such as are fixed by law or custom should have been observed in the oath which is the subject of an indictment for perjury. Thus, if the oath is not reduced to writing in situations where by law or custom it should have been done; or if the oath of a witness or party has not been read over to him before signing; or if, after being read over, it has not been signed either by the deponent or the presiding commissioner or judge; or if the judge has refused to take down any explanation which the deponent requested to have added after hearing it read over; or if the oath has been emitted verbally, the panel has modified or explained away his story; — in all these situations, the law considers the perjury as not having been committed. In some of them there is not the finished and deliberate intention to assert a falsehood on oath which the law deems indispensable to the offence; in others, the deposition has not been duly authenticated or proved to have been accurately taken down, and, therefore, the proper evidence is wanting on which the crime is to be substantiated." 1 Alison Crim. Law, 474.

[3] Ashburn *v.* The State, 15 Ga. 246.

[4] The State *v.* Trask, 42 Vt. 152. And see The State *v.* Steele, 1 Yerg. 394.

[5] Commonwealth *v.* Carel, 105 Mass. 582; Turpin *v.* Eagle Creek, &c. Road, 48 Ind. 45.

§ 1019. **Voluntary Witness.** — The witness need not have been brought into court by a subpœna,[1] nor need he be compellable to testify; for, if he does give evidence under oath, it is the same whether reluctantly or voluntarily.[2]

Incompetent. — And if a party becomes a witness for himself, when his testimony is not by law receivable, he may still commit the crime of perjury;[3] though the contrary seems, in one case, to have been held.[4] Indeed, the doctrine is general, that, though one is not a legal and competent witness in a cause, yet, if he is actually admitted and testifies, he commits perjury when what he testifies to is wilfully false.[5] But, —

Legal Weight — (Naturalization). — If the testimony of the witness can have no weight in law, as affecting the issue, then it is not perjury, on the familiar ground that it is immaterial. Therefore, where, on an application for naturalization, the applicant himself swore to his residence, while, observed the court, "the act of Congress of 1802 is express that the oath of the applicant shall, in no case, be allowed to prove his residence," — this false swearing was held not to be perjury.[6]

§ 1020. **Authorized to administer Oath.** — The oath must be administered by one having legal authority; otherwise there is no perjury in false testimony given under it.[7] For example. —

Proper Officer. — If it is administered by a judge of a State tribunal, out of the territorial jurisdiction of the State;[8] or by a master in chancery in a matter pending before the Admiralty Court;[9] or by any proper officer acting under an invalid appointment;[10] there can be no perjury. Moreover, —

[1] Commonwealth *v.* Knight, 12 Mass. 274.

[2] Anonymous, 3 Salk. 248.

[3] The State *v.* Molier, 1 Dev. 263; Van Steenbergh *v.* Kortz, 10 Johns. 167; Montgomery *v.* The State, 10 Ohio, 220; Sharp *v.* Wilhite, 2 Humph. 434; The State *v.* Keene, 26 Maine, 33; Haley *v.* McPherson, 3 Humph. 104. And see The State *v.* Whisenhurst, 2 Hawks, 458.

[4] The State *v.* Hamilton, 7 Misso. 300. And see Lamden *v.* The State, 5 Humph. 83; post, § 1027.

[5] Chamberlain *v.* People, 23 N. Y. 85. And see People *v.* Young, 31 Cal. 563.

[6] The State *v.* Helle, 2 Hill, S. C. 290. And see Silver *v.* The State, 17 Ohio, 365; post, § 1024, 1038. This provision as to naturalization is continued in R. S. of U. S. § 2165.

[7] Rex *v.* Wood, 2 Russ. Crimes, 3d Eng. ed. 632; McGragor *v.* The State, Smith, Ind. 179, 1 Ind. 232; The State *v.* McCroskey, 3 McCord, 308; Rex *v.* Hanks, 3 Car. & P. 419; Morrell *v.* People, 32 Ill. 499; Commonwealth *v.* Hughes, 5 Allen, 499. See post, § 1026 and note.

[8] Wickoff *v.* Humphrey, 1 Johns. 498.

[9] Reg. *v.* Stone, Dears. 251, 23 Law J. N. S. M. C. 14, 17 Jur. 1106, 22 Eng. L. & Eq. 593.

[10] 1 Hawk. P. C Curw. ed. p. 431, 432, § 4; Muir *v.* The State, 8 Blackf. 154. See Reg. *v.* Newton, 1 Car. & K

Jurisdiction. — The cause must be one of which the tribunal or magistrate has jurisdiction.[1]

Clerk of Court. — An oath administered by a clerk of the court is ordinarily the same as administered by the judge; subject, perhaps, to statutory exceptions in some localities.[2]

§ 1021. **Clerk exceeding Jurisdiction.** — A statute of the United States having provided a punishment "if any person, in any case, matter, hearing, or other proceeding, when an oath or affirmation shall be required to be taken or administered under or by any law or laws of the United States, shall, upon the taking of such oath or affirmation, knowingly and wilfully swear or affirm falsely," — McLean, J., held, that an oath not required by law or by order of the court, administered by the clerk of a court, is extrajudicial;[3] and, though false, lays no foundation for an indictment.[4]

§ 1022. **State Court administering Act of Congress.** — There are instances in which — not speaking particularly of perjury — the tribunals of the United States properly administer the laws of the States, yet, on the other hand, it is settled, after some diversity of opinion, that the State judicatories cannot do this of the United States laws. If, therefore, an act of Congress expressly authorizes a State court to try persons accused of an offence against the General Government, and if the latter court consents, still it cannot do so. The authority is void.[5] But —

469; Mahan *v.* Berry, 5 Misso. 21. Consider and compare this doctrine with Vol. I. § 464.

[1] Wyld *v.* Cookman, Cro. Eliz. 492, pl. 9; Paine's Case, Yelv. 111; The State *v.* Alexander, 4 Hawks, 182; The State *v.* Hayward, 1 Nott & McC. 546; The State *v.* Wyatt, 2 Hayw. 56; Commonwealth *v.* White, 8 Pick. 453; The State *v.* Furlong, 26 Maine, 69; Boling *v.* Luther, N. C. Term. R. 202; Pankey *v.* People, 1 Scam. 80; Montgomery *v.* The State, 10 Ohio, 220; Reg. *v.* Ewington, 2 Moody, 223; Clark *v.* Ellis, 2 Blackf. 8; Weston *v.* Lumley, 33 Ind. 486; Reg. *v.* Senior, Leigh & C. 401, 9 Cox C. C. 469; Reg. *v.* Bacon, 11 Cox C. C. 540; Reg. *v.* Hughes, Dears. & B. 188, 7 Cox C. C. 286; Reg. *v.* Shaw, 10 Cox C. C. 66; Reg. *v.* Lewis, 12 Cox C. C. 163, 2 Eng. Rep. 216; Reg. *v.* Willis, 12 Cox C. C. 164, 2 Eng. Rep. 218; Reg. *v.* Simmons, Bell C. C. 168; s. c. nom. Reg. *v.* Simmonds, 8 Cox C. C. 190.

[2] Server *v.* The State, 2 Blackf. 35; McGragor *v.* The State, Smith, Ind. 179, 1 Ind. 232; Warwick *v.* The State, 25 Ohio State, 21.

[3] Post, § 1027.

[4] United States *v.* Babcock, 4 McLean, 113.

[5] Story, Const. § 1756; People *v.* Lynch, 11 Johns. 549; United States *v.* Lathrop, 17 Johns. 4; United States *v.* Cornell, 2 Mason, 60; The State *v.* Pike, 15 N. H. 83; Ely *v.* Peck, 7 Conn. 239 Davison *v.* Champlin, 7 Conn. 244; Commonwealth *v.* Feely, 1 Va. Cas. 321; Jackson *v.* Rose, 2 Va. Cas. 34; Haney *v.* Sharp, 1 Dana, 442; Wetherbee *v.* Johnson, 14 Mass. 412; Stearns *v.* United States, 2 Paine, 300; The State *v.* Mo-

Concurrent Jurisdiction. — There may be a concurrent jurisdiction in some matters of *habeas corpus*, and the like.[1]

§ 1023. **Perjuries under National Government.** — It follows, that perjury against the United States cannot be punished in the State courts.[2] For, in the language of Bradley, J., "whilst certain offences, involving breaches of the peace, counterfeiting the public money, &c., may be violations of both Federal and State laws, and punishable under both, perjury in a judicial proceeding is peculiarly an offence against the system of laws under which the court is organized." And, indeed, by the statutes of the United States, it is cognizable only in the national tribunals.[3]

Oath before State Officer. — Still it is held, that a justice of the peace or other State officer, authorized to administer oaths, may be so empowered by federal law as to render a false testifying pursuant to the oath a crime punishable in the courts of the United States.[4] And, —

Naturalization Oath. — If perjury is committed in a State court, in taking out naturalization papers under the laws of the United States, the doctrine has been laid down both ways, that it is, and that it is not, indictable in the State tribunal.[5]

Custom-house Oath. — An oath required to be taken before the collector of customs may be sufficiently administered, under the acts of Congress, by his deputy.[6]

Bride, Rice, 400, overruling The State *v.* Wells, 2 Hill, S. C. 687; The State *v.* Adams, 4 Blackf. 146. Contra, United States *v.* Smith, 1 Southard, 33; Buckwalter *v.* United States, 11 S. & R. 193. See Commonwealth *v.* Schaffer, 4 Dall. App. xxvi.; The State *v.* Randall, 2 Aikens, 89; The State *v.* Buchanan, 5 Har. & J. 500; The State *v.* Tutt, 2 Bailey, 44.

[1] Commonwealth *v.* Fox, 7 Barr, 336; Ex parte Smith, 5 Cow. 273; Stearns *v.* United States, 2 Paine, 300; Ex parte Gist, 26 Ala. 156.

[2] The State *v.* Adams, 4 Blackf. 146; The State *v.* Pike, 15 N. H. 83; People *v.* Kelly, 38 Cal. 145.

[3] Brown *v.* United States, U. S. Cir. Ct. N. Dist. Ga. May 24, 1875.

[4] United States *v.* Bailey, 9 Pet. 238; United States *v.* Winchester, 2 McLean, 135.

[5] In Rump *v.* Commonwealth, 6 Casey, 475, the Pennsylvania court held such perjury to be indictable in the State tribunal, as an offence against the State, though it might also be proceeded against in the courts of the United States, as an offence against the General Government. Said Lowrie, C. J.: "Although such cases arise under the Constitution and laws of the United States, yet because these are part of the law of the land, and merely give the rule for the exercise of our admitted State functions, our State courts may entertain this jurisdiction." p. 477. Contra, by the supreme court in one of the judicial districts in New York. People *v.* Sweetman, 3 Parker C. C. 358. A later case in New Hampshire, reviewing the whole question, holds, that such perjury may be punished in the State court. The State *v.* Whittemore, 50 N. H. 245.

[6] United States *v.* Barton, Gilpin, 439; 1 Stat. Crimes, § 129.

Against United States, Statutory only. — Perjury against the United States is not indictable as a common-law offence, but only under the acts of Congress.[1] And, of course, the case must come within those acts.[2]

§ 1024. **Illustrations of Perjury.** — The following cases show in what circumstances the false testimony is perjury: —

False Plea. — A defendant in a cause knowingly gives in a false plea on oath, where an oath to the plea is required.[3]

False Articles — Affidavit. — One maliciously tenders, under oath, articles of the peace which are untrue;[4] or a false affidavit in aid of a bill in equity praying an injunction,[5] or in aid of a petition for a writ of *habeas corpus*,[6] or for a continuance,[7] or a new trial,[8] or to remove a cause to a higher court.[9] A defendant in a summary process makes a false affidavit to rid himself of the charge.[10] But the affidavit, to be the subject of perjury, must be one provided for by law.[11]

Voir Dire. — A juror answers corruptly as to his competency.[12]

Bail. — One offered as bail swears falsely to qualify himself.[13]

Poor Debtor — Before Grand Jury — Mitigation of Sentence. — A person takes a false oath under the insolvent debtor's act;[14] or testifies falsely before a grand jury;[15] or falsely, after a conviction, on the question of mitigation of sentence.[16] In these and many other cases the crime is perjury.

§ 1025. **Before what Court or Officer.** — Hawkins says: "It seems to be clearly agreed, that all such false oaths as are taken

[1] Vol. I. § 189–203; Anonymous, 1 Wash. C. C. 84.

[2] United States *v.* Kendrick, 2 Mason 69.

[3] The State *v.* Roberts, 11 Humph. 539. See Commonwealth *v.* Litton, 6 Grat. 691; ante, § 1019.

[4] Rex *v.* Parnell, 2 Bur. 806.

[5] Rex *v.* White, Moody & M. 271. See Rex *v.* Dudman, 2 Glyn & J. 389, 7 D. & R. 324, 4 B. & C. 850.

[6] White *v.* The State, 1 Sm. & M. 149.

[7] The State *v.* Shupe, 16 Iowa, 36; The State *v.* Flagg, 27 Ind. 24.

[8] The State *v.* Chandler, 42 Vt. 446.

[9] Pratt *v.* Price, 11 Wend. 127.

[10] Rex *v.* Crossley, 7 T. R. 315.

[11] Ortner *v.* People, 6 Thomp. & C. 548.

[12] The State *v.* Wall, 9 Yerg. 347; Commonwealth *v.* Stockley, 10 Leigh, 678.

[13] Commonwealth *v.* Hatfield, 107 Mass. 227; People *v.* Tredway, 3 Barb. 470.

[14] Commonwealth *v.* Calvert, 1 Va. Cas. 181. See Respublica *v.* Wright, 1 Yeates, 205.

[15] Reg. *v.* Hughes, 1 Car. & K. 519. And see Commonwealth *v.* Pickering, 8 Grat. 628; Commonwealth *v.* Parker, 2 Cush. 212. The same, under the statute of Indiana. The State *v.* Offut, 4 Blackf. 355. Also, under this Indiana statute, the same of an affidavit for the continuance of a cause. The State *v.* Johnson, 7 Blackf. 49.

[16] The State *v.* Keenan, 8 Rich. 456. See Stephens *v.* The State, 1 Swan, Tenn. 157.

before those who are any ways intrusted with the administration of public justice, in relation to any matter before them in debate, are properly perjuries. It hath been holden, that, not only such persons are indictable for perjury who take a false oath in a court of record upon an issue therein joined, but also all those who forswear themselves in a matter judicially depending before any court of equity, or spiritual court, or any other lawful court,[1] whether the proceedings therein be of record or not, or whether they concern the interest of the king or subject. And it is said to be no way material, whether such false oath be taken in the face of a court, or persons authorized by it to examine a matter, the knowledge whereof is necessary for the right determination of a cause; and therefore that a false oath before a sheriff, upon a writ of inquiry of damages, is as much punishable as if it were taken before the court on trial of the cause." [2]

§ 1026. **In Course of Justice.** — The test to determine whether the oath is such as renders a violation of it perjury is, whether it is administered in a *course of justice*.[3] Thus, —

Oath of Office. — The offence cannot be founded on a mere oath of office.[4] But —

Poor Debtor. — It may be committed in the examination of a poor debtor before a justice of the peace; because, though the proceeding is not judicial, it is in a course of justice.[5]

Ecclesiastical Council. — In Connecticut, a false oath before an ecclesiastical council, in a course of discipline, will, it has been held, sustain an indictment for perjury,[6] — a proposition which, it is presumed, would not be everywhere accepted.[7]

Case in Arbitration — Temporal Gain or Loss. — A case in arbi-

[1] For instance, a court baron. Anonymous, 1 Mod. 55; Anonymous, 1 Sid. 454.

[2] 1 Hawk. P. C. Curw. ed. p. 430, § 3.

[3] See cases cited infra, to this section; also Commonwealth *v.* Warden, 11 Met. 406; Reg. *v.* Castro, Law Rep. 9 Q B. 350, 12 Cox C. C. 454, 6 Eng. Rep. 317.

[4] The State *v.* Dayton, 3 Zab. 49. There may be various reasons for this proposition. Hawkins says: "The notion of perjury is confined to such public oaths only, as affirm or deny some matter of fact, contrary to the knowledge of the party; and, therefore, it doth not extend to any promissory oaths whatsoever [see post, § 1030]. From which it clearly follows, that no officer, public or private, who neglects to execute his office in pursuance of his oath, or acts contrary to the purport of it, is indictable for perjury in respect of such oath; yet it is certain that his offence is highly aggravated by being contrary to his oath, and therefore that he is liable to the severer fine on that account." 1 Hawk. P. C. Curw. ed. p. 431.

[5] Arden *v.* The State, 11 Conn. 408.

[6] Chapman *v.* Gillet, 2 Conn. 40.

[7] See post, § 1027

tration, under a rule of court, is in a course of justice; therefore a false swearing before the arbitrators is perjury.[1] And the South Carolina tribunal, on the strength of the Connecticut doctrine just stated, not only held this, where the oath had been administered by a justice of the peace, but laid it down further, that, in all cases of an oath taken "in the course of a proceeding sanctioned by the express enactment of the legislature, or by the common consent and usage of mankind, and from which a temporal loss to any one arises, it is perjury to swear falsely."[2] The oath cannot, according to another case, be administered by the arbitrators themselves, who have no power,[3] but must be by an officer, as a justice of the peace, authorized to administer oaths.[4] The Missouri tribunal held, not altogether in conflict with this doctrine, that, when the submission to arbitrators is by parol, out of court, a witness cannot commit perjury, though duly sworn by a justice of the peace.[5]

Other Cases. — The foregoing doctrines extend to other cases falling within the like principle.[6]

[1] Reg. *v.* Ball, 6 Cox C. C. 360.

[2] The State *v.* Stephenson, 4 McCord, 165. See post, § 1027.

[3] Ante, § 1020.

[4] The State *v.* McCroskey, 3 McCord, 308. See also Reg. *v.* Hallett, 2 Den. C. C. 237, 15 Jur. 433, 20 Law J. N. S. M. C. 197. Hawkins says: "It seemeth clear, that no oath whatsoever taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature without legal authority for their so doing, or before those who are legally authorized to administer some kinds of oaths, but not those which happen to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seemingly colorable, but in truth unwarranted and merely void, can ever amount to perjuries in the eye of the law, because they are of no manner of force, but are altogether idle." 1 Hawk. P. C. Curw. ed. p. 431, § 4. See ante, § 1018.

[5] Mahan *v.* Berry, 5 Misso. 21.

[6] **Court Martial.** — It seems that the taking of a false oath before a court martial is perjury at the common law. Reg. *v.* Heane, 4 B. & S. 947; The State *v.* Gregory, 2 Murph. 69. **Fishing Bounty.** — Where taking false oath to procure, not perjury. United States *v.* Nickerson, 1 Sprague, 232. **Legislative Investigation.** — Perjury may be committed on, within the California statute. Ex parte McCarthy, 29 Cal. 395. **Oath to procure Marriage License.** — Perjury may be assigned on. Warwick *v.* The State, 25 Ohio State, 21; Reg. *v.* Barnes, 10 Cox C. C. 539; Call *v.* The State, 20 Ohio State, 330. See post, § 1029. **Depositions for Foreign Use.** — Under statutes, perjury on. Stewart *v.* The State, 22 Ohio State, 477; Commonwealth *v.* Smith, 11 Allen, 243; see post, § 1029. And see, for other illustrative cases, People *v.* Travis, 4 Parker C. C. 213; United States *v.* Sonachall, 4 Bis. 425; Harris *v.* People, 6 Thomp. & C. 206, 4 Hun, 1; Reg. *v.* Greenland, Law Rep. 1 C. C. 65; Reg. *v.* Tomlinson, Law Rep. 1 C. C. 49, 10 Cox C. C. 332; Reg. *v.* Proud, Law Rep. 1 C. C. 71, 10 Cox C. C. 455; Reg. *v.* Berry, Bell C. C. 46, 8 Cox C. C. 121; Commonwealth *v.* Hughes, 5 Allen, 499.

§ 1027. **Extrajudicial.** — We are thus led to the general proposition, that no extrajudicial oath will sustain an indictment for this offence.[1] Therefore, —

Swearing to Account. — In South Carolina, swearing to an account, to be rendered before an administrator, has been held to be extrajudicial, not subjecting the party who swears falsely to an indictment.[2] A like doctrine has been held, in Tennessee, as applicable to a cause in the Court of Chancery, wherein there was no right to administer the oath.[3] But where an oath of this sort is made of effect by statute, the false swearing will be perjury.[4]

In Bargaining. — "A false oath," says Hawkins, "taken by one upon the making of a bargain, that the thing sold is his own, is not punishable as perjury."[5]

§ 1028. **Cause properly in Court.** — Thus are we led to the further proposition, that, not only must the tribunal have jurisdiction of the cause, as before explained,[6] but the cause must be properly in court.[7] Therefore, —

Abated. — If it is abated by the death of a party, or otherwise, there is no perjury in the false swearing.[8] But —

Defects in Proceedings. — Where, in the proceedings, there is a mere formal defect, which is amendable;[9] or where, in an affidavit out of court, there is something in the jurat which must be amended before it can be used,[10] the actual use of it not being essential to the offence;[11] or probably in all cases of defective proceedings voidable merely, not void;[12] or, *a fortiori*, where the judge at the trial permits the cause to go on upon a pleading not sufficiently definite,[13] or perhaps not completed,[14] or, by agree-

[1] Pegram *v.* Styron, 1 Bailey, 595; Lamden *v.* The State, 5 Humph. 83; Waggoner *v.* Richmond, Wright, 173; Rex *v.* Foster, Russ. & Ry. 459; Wickoff *v.* Humphrey, 1 Johns. 498; United States *v.* Nickerson, 1 Sprague, 232.

[2] Pegram *v.* Styron, supra.

[3] Lamden *v.* The State, supra. See ante, § 1019.

[4] Warner *v.* Fowler, 8 Md. 25.

[5] 1 Hawk. P. C. Curw. ed. p. 431. And see ante, § 1014.

[6] Ante, § 1020.

[7] See cases cited to this section, infra; also Reg. *v.* Scotton, 8 Jur. 400; Reg. *v.* Ewington, Car. & M. 319.

[8] Rex *v.* Cohen, 1 Stark. 511; The State *v.* Hall, 49 Maine, 412; Reg. *v.* Pearce, 3 B. & S. 531, 9 Cox C. C. 258.

[9] Pippet *v.* Hearn, 1 D. & R. 266, 5 B. & Ald. 634; Rex *v.* Christian, Car. & M. 388; The State *v.* Lavalley, 9 Misso. 834.

[10] Rex *v.* Hailey, Ryan & Moody, N. P. 94, 1 Car. & P. 258. See Cook *v.* Staats, 18 Barb. 407.

[11] Rex *v.* Hailey, supra; Rex *v.* Crossley, 7 T. R. 315; Rex *v.* Christian, Car. & M. 388.

[12] Van Steenbergh *v.* Kortz, 10 Johns 167.

[13] The State *v.* Keene, 26 Maine, 33.

[14] The State *v.* Lewis, 10 Kan. 157. See Commonwealth *v.* Smith, 11 Allen, 243.

ment of parties, before an inadequate number of jurors,[1] or where otherwise a defect in the proceedings has been waived by the parties;[2] perjury may be committed.

Preliminaries Waived. — There is much, in a cause, which a party may waive; and, if a defendant, not being served with process, appears and answers to the plaintiff's allegations, the court has complete jurisdiction, and perjury may be committed.[3]

Judgment reversed. — A man's responsibility to the criminal law depends on the facts existing when his alleged wrongful act is committed.[4] Therefore, in perjury, though the final judgment has been reversed on writ of error, any false swearing at the trial may still be proceeded against by indictment.[5]

Witness not believed. — And if the cause goes to the jury, and they give no credit to the false testimony, the result is not different.[6]

Cause not yet Pending. — As a sort of general doctrine, if a suit is contemplated, perjury in it cannot be committed until it is commenced.[7] But there are cases in which a statute permits depositions to be taken in aid of an intended future suit; and, in such a case, it is plain in principle that false swearing will be perjury. And in New Hampshire it was held, that perjury may be committed in an affidavit made to be used in a naturalization proceeding, the usual practice being to receive in evidence an affidavit of this sort. And Smith, J., considered, that, on the authorities, "perjury may be committed in affidavits taken to be used in some judicial proceeding which the party taking them intends to institute, although he afterwards fails to carry out that intention."[8]

§ 1029. **Indictable False Swearing, which is not Perjury.** — A false affidavit may be of a nature to be indictable as a misdemeanor,

[1] The State *v.* Hall, 7 Blackf. 25.

[2] Reg. *v.* Fletcher, Law Rep. 1 C. C. 320.

[3] Reg. *v.* Fletcher, Law Rep. 1 C. C. 320, 12 Cox C. C. 77; Reg. *v.* Mason, 29 U. C. Q. B. 431; Reg. *v.* Simmons, Bell C. C. 168; s. c. nom. Reg. *v.* Simmonds, 8 Cox C. C. 190.

[4] Commonwealth *v.* Tobin, 108 Mass. 426; People *v.* Jones, 1 Mich. N. P. 141. But see Commonwealth *v.* Dickinson 3 Pa. Law Jour. Rep. 265.

[5] Reg. *v.* Meek, 9 Car. & P. 513.

[6] Hamper's Case, 3 Leon. 230.

[7] People *v.* Chrystal, 8 Barb. 545.

[8] The State *v.* Whittemore, 50 N. H. 245, 249, referring to Rex *v.* White, 1 Moody & M. 271; King *v.* Reg. 14 Q. B. 31. And see Miller *v.* Munson, 34 Wis. 579; Mairet *v.* Marriner, 34 Wis. 582; Reg. *v.* Bishop, Car. & M. 302.

on common-law principles, while it does not amount to the technical offence of perjury.[1] Thus, —

Foreign Affidavit. — While perjury cannot be assigned on a foreign affidavit,[2] yet, if a person knowingly uses it here, being false, he commits the indictable misdemeanor of attempting to pervert public justice.[3] And, —

To procure Marriage Certificate. — In England, a false oath taken before a surrogate, to deceive him into granting improperly a marriage certificate, though not perjury, is a criminal misdemeanor.[4]

II. *Materiality of the Testimony to the Issue or Point of Inquiry.*

§ 1030. **Must be Material.** — What is sworn to must, for perjury to be predicated upon it, be pertinent and material to the issue or question in controversy.[5]

§ 1031. **Prejudicial.** — Some of the authorities add, that it must also be of a nature to prejudice some person or the State.[6] This,

[1] Rex *v.* O'Brian, 2 Stra. 1144, 7 Mod. 378; Ex parte Overton, 2 Rose, 257; Rex *v.* De Beauvoir, 7 Car. & P. 17; ante, § 1014.

[2] Musgrave *v.* Medex, 19 Ves. 652.

[3] Omealy *v.* Newell, 8 East, 364. As to false evidence given here, under a commission from a tribunal in a foreign country, see Calliand *v.* Vaughan, 1 B. & P. 210; ante, § 1026, note.

[4] Reg. *v.* Chapman, 1 Den. C. C. 432, Temp. & M. 90, 13 Jur. 885, 18 Law J. N. S. M. C. 152. See ante, § 1026, note.

[5] Bullock *v.* Koon, 4 Wend. 531; Reg. *v.* Tate, 12 Cox C. C. 7, 2 Eng. Rep. 164; Reg. *v.* Naylor, 11 Cox C. C. 13; Reg. *v.* Harvey, 8 Cox C. C. 99; Reg. *v.* Berry, Bell C. C. 46, 8 Cox C. C. 121; Reg. *v.* Ball, 6 Cox C. C. 360; Hembree *v.* The State, 52 Ga. 242; Commonwealth *v.* Grant, 116 Mass. 17; The State *v.* Gibson, 26 La. An. 71; The State *v.* Trask, 42 Vt. 152; Reg. *v.* Townsend, 4 Fost. & F. 1089; The State *v.* Aikens, 32 Iowa, 403; Gibson *v.* The State, 44 Ala. 17; Hood *v.* The State, 44 Ala. 81; Nelson *v.* The State, 47 Missis. 621; Reg. *v.* Alsop, 11 Cox C. C. 264; Galloway *v.* The State, 29 Ind. 442; The State *v.* Hobbs, 40 N. H. 229; Reg. *v.* Townsend, 10 Cox C. C. 356; Wood *v.* People, 59 N. Y. 117.

[6] Rex *v.* Aylett, 1 T. R. 63; Commonwealth *v.* Knight, 12 Mass. 274; The State *v.* Ammons, 3 Murph. 123; Martin *v.* Miller, 4 Misso. 47; Pankey *v.* People, 1 Scam. 80; Reg. *v.* Overton, Car. & M. 655; Commonwealth *v.* Pickering, 8 Grat. 628; Reg. *v.* Phillpotts, 2 Den. C. C. 302; s. c. nom. Reg. *v.* Philpotts, 8 Eng. L. & Eq. 580; Reg. *v.* Yates, Car. & M. 132, 5 Jur. 636; McMurry *v.* The State, 6 Ala. 324; White *v.* The State, 1 Sm. & M. 149; Rex *v.* Drue, 1 Sid. 274; Weathers *v.* The State, 2 Blackf. 278; The State *v.* Hayward, 1 Nott & McC. 546; Steinman *v.* McWilliams, 6 Barr, 170; Commonwealth *v.* Parker, 2 Cush. 212; The State *v.* Hattaway, 2 Nott & McC. 118; Hinch *v.* The State, 2 Misso. 158; Studdard *v.* Linville, 3 Hawks, 474. In The State *v.* Dodd, 3 Murph. 226, Henderson, J., observed: "We know of no rule or criterion by which an act can be ascertained to be criminal, but that of its being against the interest of the State. A false oath is only injurious to the

however, is a mere formal proposition, of no practical consequence. As of course, false swearing to what is material in a controversy is prejudicial, both to the public interests, and to those of the individual whose rights it was meant to defeat.

§ 1032. **Nature of the required Materiality.** — How, and to what extent, the testimony must be material can best be shown by illustrations; thus, —

Collateral Issue — (Credit of a Witness). — It need affect only a collateral issue;[1] as, "if the credit of a witness is in question, and another person to support it swears falsely, it is perjury."[2]

Abate the Suit. — Likewise it is perjury to swear falsely to what would, if true, merely cause the particular proceeding to be abated.[3]

Link in Chain of Evidence. — Neither need it be sufficient of itself alone to produce the wrong result; if it is a part, or link, it is sufficient.[4]

Voluntary or not. — So there is no rule making any distinction, whether it comes voluntarily from the witness, in answer to no question put, or is responsive to a particular inquiry; for, in either case, the witness is sworn to speak the truth.[5]

Promissory. — Of course, a promise cannot be material to any

State, or even to an individual, when it tends to prevent right. Therefore, to constitute perjury, it must be to some material fact tending to injure some person. If it be entirely immaterial, it cannot affect any one; it wants a necessary ingredient to constitute it an offence against society." **Advantageous to the State.** — If an oath has been broken by giving false testimony advantageous to the government, still the prosecuting authority may proceed against the giver of it for perjury. Agar's Case, Sir F. Moore, 627.

[1] The State *v.* Keenan, 8 Rich. 456; The State *v.* Lavalley, 9 Misso. 834; Commonwealth *v.* Pollard, 12 Met. 225; The State *v.* Shupe, 16 Iowa, 36.

[2] Rex *v.* Greep, Holt, 535, Comb. 459; s. c. nom. Rex *v.* Griepe, 1 Ld. Raym. 257, 12 Mod. 139; s. c. nom. Rex *v.* Gripe, 1 Comyn, 43, note; Wood *v.* People, 59 N. Y. 117. And see Salmons *v.* Tait, 31 Ga. 676; Reg. *v.* Worley, 3 Cox C. C. 535.

[3] Reg. *v.* Mullany, Leigh & C. 593. **Irrelevant, but to mislead.** — In this case Erle, C. J., said: "When the question arises, whether false swearing in a judicial proceeding, with intent to mislead, is to be free from punishment, because it is wholly irrelevant and immaterial to the issue that is being tried, that will be a question for the fifteen judges to decide [referring to some observations by Maule, J., in Reg. *v.* Phillpotts, 2 Den. C. C. 302, 306], though, for my own part, I should be inclined to hold that any false swearing in a judicial proceeding, with intent to mislead, whether material or not, would amount to the crime of perjury." p. 596.

[4] The State *v.* Dayton, 3 Zab. 49; Commonwealth *v.* Pollard, 12 Met. 225; Wood *v.* People, 59 N. Y. 117.

[5] Commonwealth *v.* Knight, 12 Mass. 274.

issue; and a mere promissory oath, or promissory statement under oath, is no perjury.[1]

§ 1033. **Old Illustrations of Immaterial.** — Hawkins, an authority of himself,[2] observes as follows: "It seemeth clear, that, if the oath for which a man is indicted of perjury be wholly foreign from the purpose, or altogether immaterial, and neither any way pertinent to the matter in question, nor tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury, because it is merely idle and insignificant. As if, upon a trial in which the question is whether such a one was *compos* or not, a witness introduces his evidence by giving a history of a journey which he took to see the party, and happens to swear falsely in relation to some of the circumstances of the journey. Also it hath been adjudged, that, where a witness, being asked by a judge whether A brought a certain number of sheep from one town to another all together? answered that he did so; where in truth A did not bring them all together, but part at one time and part at another; yet such witness was not guilty of perjury, because the substance of the question was, whether A did bring them at all or not, and the manner of bringing them was only a circumstance. And upon the same ground it is said to have been adjudged, that, where a witness being asked, whether such a sum of money were paid for two things in controversy between the parties? answered, that it was, where in truth it was paid only for one of them by agreement, such witness ought not to be punished for perjury; because, as the case was, it was no way material whether it were paid for one or both. Also it is said to have been resolved, that a witness who swore that one drew his dagger and beat and wounded J. S., where in truth he beat him with a staff, was not guilty of perjury, because the beating only was material.[3]

§ 1034. **Materiality as affected by the Form of the Question.** — If, in the trial of a cause, the attention of a witness is directed to a specific thing, and the form of the question indicates that he is expected to be exact in his answer, not only is he placed on his

[1] 1 Hawk. P. C. Curw. ed. p. 431. See ante, § 1026 and note.

[2] See Vol. I. § 77, 78.

[3] 1 Hawk. P. C. Curw. ed. p. 433, § 8; Ib. 8th ed. c. 69, § 8.

guard against mistakes, but the jury are led to give to the testimony a consideration which otherwise they might not do. Therefore, in some circumstances, the form of the interrogatory is decisive as to whether or not the false swearing is perjury. Thus, —

Between two Dates — Specific. — Where a transaction was on a particular Sunday, and the prisoner had in general terms testified that it did not take place on any Sunday between two dates which included the one in question, this was ruled, by Pollock, C. B., not to sustain an indictment for perjury; because his attention "ought to have been called to the particular day on which the transaction took place, as to which he was to speak."[1] Yet, consistently with this ruling, and expressly recognizing it as correct, the Court of Criminal Appeal held, that, where at a trial the prisoner was asked three or four times by the advocate and the judge, whether he did at any time, either on his own account or that of another person named, have of A any coals on credit, to which he answered "I did not," — this was sufficiently specific.[2]

[1] Reg. *v.* Stolady, 1 Fost. & F. 518.

[2] Reg. *v.* London, 12 Cox C. C. 50. Hawkins, writing of the materiality of the evidence, says: "Perhaps, in all these cases, it ought to be intended, that the question was put in such a manner that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him through inadvertency to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance by examining him strictly concerning the circumstances, and he give a particular and distinct account of the circumstances, which afterwards appears to be false; surely [Immaterial, to strengthen the Material. See post, § 1037.] — he cannot but be guilty of perjury, inasmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence, than his appearing to have an exact and particular knowledge of all the circumstances relating to it. And upon these grounds I cannot but think the opinion of those judges very reasonable who held, that a witness was guilty of perjury, who, in an action of trespass for breaking the plaintiff's close and spoiling it with sheep, deposed that he saw thirty or forty sheep in the said close, and that he knew them to be the defendant's, because they were marked with such a mark, which he knew to be the defendant's mark, where in truth the defendant never used such a mark; for the giving such a special reason for his remembrance could not but make his testimony more credible than it would have been without it; and, though it signified nothing to the merits of the cause whether the sheep had any mark at all or not, yet, inasmuch as the assigning such a circumstance in a thing immaterial had such a direct tendency to corroborate the evidence concerning what was most material, and consequently was equally prejudicial to the party, and equally criminal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue, there doth not seem to be any reason why it

§ 1035. **Pertinent Evidence wrongly admitted.** — The reader will call to mind cases in which, when a party puts a question to a witness, who answers it, he is bound by the answer; not being permitted to contradict the witness by producing other testimony. Suppose, however, he does produce other testimony, and the court, contrary to rule, receives it; and the witness, testifying, speaks falsely: — is this perjury? In a late English case, it appeared that a woman was delivered of a bastard child on the 29th of March, 1861. On her application thereafter for an order of affiliation, she was on cross-examination asked by the defendant, whether one Gibbon did not have carnal connection with her the previous September. This was at a time subsequent to the conception, and her answer, whatever it might be, could only go to her credibility as a witness; it would not directly affect the issue. Still, had she answered falsely, she might have been indicted for perjury. But her answer, right or wrong, bound the defendant, and, according to the established rule of evidence, he could not be permitted to contradict what she said responsive to his question. She replied, that she did not have the connection. Gibbon was then produced, and was by the magistrates permitted, contrary, as we have seen, to the rule, to testify against her, and he declared that the connection did take place. For this testimony, which was false, he was indicted: and the majority of the English judges decided, after hearing two arguments, that the indictment for perjury could be maintained.[1]

should not be equally punishable. But I cannot find this matter anywhere thoroughly settled or debated, and therefore shall leave it to every man's own judgment, which, from the consideration of the circumstances of each particular case, may generally without any great difficulty discern, whether the matter in which perjury is assigned were wholly impertinent, idle, and insignificant, or not, which seems to be the best rule for determining whether it be punishable as perjury or not." 1 Hawk. P. C. Curw. ed. p. 434, § 8, cl. 2; Ib. 6th ed. c. 69, § 8, cl. 2. And see observations of Erle, C. J., ante, § 1031, note.

[1] Reg. *v.* Gibbon, Leigh & C. 109, 9 Cox C. C. 105. Said Cockburn, C. J.: "I have to deliver the opinion of all the judges who have heard the case, except my brothers Crompton and Martin, that the conviction was right, and should be affirmed. The question was pertinent, so far as the complainant was concerned, and she was bound to answer it. Although it did not refer to the main issue, which was the paternity of the child, it had a bearing upon what was indirectly in issue, namely, how far the complainant was deserving of credit. Possibly, if the complainant had answered the question in the affirmative, not much weight would have been attached to her admission in deciding the main issue. Certainly, if she had answered the question falsely, she might have been indicted for perjury. She was bound to answer. Then, inasmuch as the question only

§ 1036. **How in Principle.** — The true test would seem, in reason, to be, whether the evidence could have properly influenced the tribunal. Though by accepted rules of practice it ought to have been rejected; still, if admitted, it must be deemed to have wrought its legitimate results. The ruling of the judge was the law for the moment and the occasion when and upon which the witness gave the testimony; therefore, if it was pertinent and false, it should be adjudged perjury.

§ 1037. **Strengthening what is Material.** — Where the evidence is simply to explain how it was the witness knew the thing which he states,[1] — as where, testifying to an *alibi*, he mentions the person's residence and habits, to show he could not be mistaken on the main point, — here, since the incidental matter is calculated to incline the jury to give a more ready credit to the substantial part, it will sustain a conviction for perjury, if wilfully false.[2]

§ 1038. **Further Illustrations of Material Evidence.** — The reader, in tracing out the law, will not omit the authorities cited at

affected her credit, as soon as she had answered it, all should have been bound by her answer. That is an established rule of our law. Notwithstanding that, the magistrates admitted the evidence of the prisoner, which legally was inadmissible. Then, although not legally admissible, yet, being admitted, it had a reference to what I have already said was indirectly in issue, the credibility of the complainant. The evidence having been admitted, although wrongly, Reg. *v.* Phillpotts, 2 Den. C. C. 302, is an authority that perjury may be assigned upon it. That decision is directly in point, and I entirely go along with it. Although the evidence was open to objection, yet it does not lie in the witness's mouth to say that it was not a question on which he was bound to speak the truth." Crompton, J., with whom Martin, B., concurred, said: "I am not satisfied that the conviction was right. Before a man can be convicted of perjury, it is necessary to show that his evidence was material in the cause. Formerly it was necessary to show on the indictment how the evidence was material. Subsequently it became sufficient to allege that it was material, without showing how it was so. Then, how is this evidence material? It does not affect the question in the cause. It could only be asked of the woman as going to her credit, as might be done on a trial for stealing, and her answer must be taken. The case has been very properly distinguished from cases of rape, by my brother Williams. I agree with the chief justice, that, though once it was doubtful, yet it is now clearly established, that a cross-examination going to a witness's credit is material, and that perjury may be assigned upon it. But, subject to this liability, her answer was conclusive. As soon as that was given, it ought to have been taken as established that no connection with Gibbon had taken place. Then, that being so, that matter was no longer a question in the cause; and the allegation of materiality would not be true, because by law the fact must be assumed to have been as the woman stated it to be. The evidence was inadmissible, because it was no longer a question in the cause. The woman's answer was conclusive proof on the subject." p. 119–121. See Reg. *v.* Murray, 1 Fost. & F. 80.

[1] Ante, § 1034, note.

[2] Reg. *v.* Tyson, Law Rep. 1 C. C. 107.

§ 1031, 1032; but a few points further, within the general doctrine, will be of assistance to him.

Aggravate Damages or Punishment. — Testimony tending to aggravate the damages or punishment is material.[1]

Credit of Witness. — So also, in some late cases, the English judges have held the broad doctrine, that "every question on cross-examination that goes to the credit of a witness is material;" and the answer, if wilfully false, will be perjury.[2] There is practical difficulty in applying this rule; and how far the American courts will carry it, cannot be stated.[3]

Statute of Frauds. — Another proposition is, that, if a witness denies on his oath a promise which the Statute of Frauds requires to be in writing, he does not commit this offence; because the promise by parol does not bind the party, and so the proof of it by parol has no tendency to establish any question in issue.[4] But, —

Trustee Process — Usurious Contract. — In Massachusetts, under the former usury laws, one summoned as trustee in a garnishment process could discharge himself by declaring on oath that he had paid the money on a usurious contract. Still if, after such discharge, on a controversy concerning the oath of the trustee, the principal defendant denies under oath the existence of the usurious contract, he commits, the denial being false, the offence of perjury.[5] And, —

Writing impeached for Fraud. — Where a written agreement is attempted to be impeached in a court of equity for fraud, if, in answer to the bill, the defendant denies parol qualifications of it, this denial, when false, is perjury.[6]

§ 1039. **Affidavit for Search-warrant.** — Where an affidavit to procure a search-warrant on a charge of felony is false, the affi-

[1] Stephens *v.* The State, 1 Swan, Tenn. 157; The State *v.* Norris, 9 N. H. 96.

[2] Reg. *v.* Overton, 2 Moody, 263 (and see the American note), Car. & M. 655; ante, § 1035, note. Where a witness was inquired of, — "Have you not passed by the name of Abbott, and also of Johnson?" And he replied, "I have never passed by the assumed name of Abbott or Johnson," — this, though false, was ruled not to be perjury. Reg. *v.* Worley, 3 Cox, C. C. 535.

[3] Studdard *v.* Linville, 3 Hawks, 474, overruling The State *v.* Strat, 1 Murph. 124.

[4] Rex *v.* Dunston, Ryan & Moody, N. P. 109; Rex *v.* Benesech, Peake Ad. Cas. 93. And see ante, § 1019; 2 Russ. Crimes, 3d Eng. ed. 601.

[5] Commonwealth *v.* Parker, 2 Cush. 212.

[6] Reg. *v.* Yates, Car. & M. 132, 5 Jur 636; 2 Russ. Crimes, 3d Eng. ed. 602.

ant is equally indictable whether a particular person is mentioned as the guilty one, or not.[1] Again, —

Joint Defendants. — On a proceeding against three or more for assault, the acts of each are receivable in evidence against all; therefore testimony concerning such acts, if wilfully false, is perjury.[2]

Omission. — Hume, writing of the Scotch law, says, "it will be difficult to ground, in any case, a relevant charge of perjury upon a mere omission;"[3] but clearly this distinction points only to the difficulty of making proof, for witnesses are sworn to tell the whole truth.[4]

§ 1039 *a*. **Materiality for the Court.** — The materiality of the testimony is a question of law, not of fact.[5] But, like any other question of law, it may be so mingled with fact that the court should submit it, with proper instructions upon the law, to the jury.[6]

§ 1040. **Opinion of Witness.** — The opinion of a witness may be important to the issue. If then he swears falsely to his opinion, he commits perjury; though this is usually difficult to establish in proof.[7] And, —

Construction of Writings. — Growing, it may be, out of the difficulty of proof, the doctrine is laid down, that perjury cannot be committed in testimony to the legal construction of a written instrument.[8] Generally such a question will be for the court, and evidence to it irrelevant, therefore not a foundation for perjury; but, in cases not involving this principle, no reason appears why, if a witness swears to a construction which he

[1] Carpenter *v.* The State, 4 How. Missis. 163.

[2] The State *v.* Norris, 9 N. H. 96.

[3] 1 Hume Crim. Law, 2d ed. 361.

[4] United States *v.* Conner, 3 McLean, 573; Commonwealth *v.* Cook, 1 Rob. Va. 729. See Rex *v.* Moody, 5 Car. & P. 23; s. c. nom. Rex *v.* Mudie, 1 Moody & R. 128.

[5] Cothran *v.* The State, 39 Missis. 541; Reg. *v.* Courtney, 7 Cox, C. C. 111; People *v.* Jones, 1 Mich. N. P. 141; The State *v.* Lewis, 10 Kan. 157.

[6] Reg. *v.* Goddard, 2 Fost. & F. 361; Reg. *v.* Worley, 3 Cox, C. C. 535.

[7] Reg. *v.* Schlesinger, 10 Q. B. 670, 12 Jur. 283, 17 Law J. N. s. M. C. 29; Fergus *v.* Hoard, 15 Ill. 357; The State *v.* Lea, 3 Ala. 602; Patrick *v.* Smoke, 3 Strob. 147; The State *v.* Cruikshank, 6 Blackf. 62; Rex *v.* Pedley, 1 Leach, 4th ed. 325. See 1 Hawk. P. C. Curw. ed. p. 433, § 7 and note; 1 Gab. Crim. Law, 793; 2 Russ. Crimes, 3d Eng. ed. 597; 1 Alison Crim. Law, 468. **Sufficiency of Surety.** — A witness, testifying to the sufficiency of a surety at a particular time, says, "he considered him good;" that expression is not merely his opinion, but is admissible as a statement of fact. Commonwealth *v.* Thompson, 3 Dana, 301.

[8] Rex *v.* Crespigny, 1 Esp. 280; The State *v.* Woolverton, 8 Blackf. 452.

knows to be wrong, and the proof of his corruption is ample, he should not be indictable as a perjurer the same as for any other false swearing.

Charge of Larceny. — Where the words of the witness were, that a person named "did feloniously steal, take, and carry away a rifle," &c., this was held to be a statement of fact, not of law.[1]

§ 1041. **Testimony as to Interlineations.** — If interlineations in a written instrument are shown to have been made by one or other of two persons, then, if he who made them swears that he did not, he commits perjury.[2]

"Value Received." — The words "value received" are not material in a promissory note; therefore it is not perjury for a defendant to deny having used them in making such a note.[3]

§ 1042. **Negative Testimony.** — When a man untruly testifies, that he did not send his son to school a year, he commits perjury or not, according as the fact of such sending is relevant or not to the issue on trial.[4]

Enforcing Laws against Gaming. — A witness swearing falsely, before the grand jury, as to his knowledge whether or not persons had violated the laws against gaming, commits perjury.[5]

III. *The Testimony as being false.*

§ 1043. **Corrupt.** — The testimony, we shall see by and by,[6] must be corrupt; and from this proposition may be inferred the further one, that it must be false.[7] But, —

True, yet believed to be False. — If the witness supposes he is testifying falsely, it is corrupt as to him, and a perversion of truth

[1] Hoch *v.* People, 3 Mich. 552. And see The State *v.* Lea, 3 Ala. 602.

[2] Smith *v.* Deaver, 6 Jones, N. C. 563.

[3] People *v.* McDermott, 8 Cal. 288. I have stated, in the text, what of undoubted law can be drawn from this case. **Form of an Instrument.** — But the case seems to hold, that, where a defendant is sued on a promissory note, declared on as containing the words "value received," if he swears to having made a note, but not in these words, he does not, though his oath is false, commit perjury. Now, it seems to me, that, under some circumstances, there might be, for instance, a question of variance raised on such testimony, rendering it material; and, if it amounted to a denial of the making of the particular note, it would be material in the fullest sense.

[4] Floyd *v.* The State, 30 Ala. 511. And see Flemister *v.* The State, 48 Ga. 170.

[5] The State *v.* Terry, 30 Misso. 368.

[6] Post, § 1045 et seq.

[7] The State *v.* Wood, 17 Iowa, 18; The State *v.* Raymond, 20 Iowa, 582; The State *v.* Trask, 42 Vt. 152; Juaraqui *v.* The State, 28 Texas, 625.

in a course of justice; it is, therefore, perjury, though in fact what he says is true.[1]

§ 1044. **Testifying to Two Opposite Things.** — If a witness testifies — either in two different causes, or in one cause at different examinations, or at one examination — to two opposite things, irreconcilable with each other, he commits perjury in making the false statement, but not in making the true one.[2] And though what he said when he told the truth may be shown in evidence against him on an indictment for the falsehood, yet there must be testimony outside of his own contradictory statements as to which of them is false.[3]

IV. *The Intent.*

§ 1045. **Deliberate and Corrupt.** — Hawkins says: "It seemeth that no one ought to be found guilty [of this offence], without clear proof that the false oath alleged against him was taken with some degree of deliberation; for, if, upon the whole circumstances of the case, it shall appear probable that it was owing rather to the weakness than perverseness of the party, as where it was occasioned by surprise, or inadvertency, or a mistake of the true state of the question, it cannot but be hard to make it amount to voluntary and corrupt perjury, which is of all crimes whatsoever the most infamous and detestable."[4]

§ 1046. **"Wilful and Corrupt."** — That perjury must be what the law calls wilful and corrupt is settled.[5] Even an indictment which charges the defendant with having "falsely" and maliciously given in the testimony is not sufficient, unless it also alleges that the swearing was "wilful," or was "corrupt;" or perhaps the two words must be united.[6]

[1] Vol. I. § 437; 3 Inst. 166; Bishop First Book, § 116–119.

[2] Martin *v.* Miller, 4 Misso. 47; Maynard's Case, 1 Vent. 182.

[3] 1 Hume Crim. Law, 2d ed. 366; Dodge *v.* The State, 4 Zab. 455; Reg. *v.* Hughes, 1 Car. & K. 519; The State *v.* J. B., 1 Tyler, 269. The majority of the judges, in People *v.* Burden, 9 Barb. 467, seemed to be of opinion, that the circumstances and form of the second statement may be such as to render it sufficient in proof of perjury in the first, without external evidence.

[4] 1 Hawk. P. C. Curw. ed. p. 429, § 2.

[5] Wyld *v.* Cookman, Cro. Eliz. 492, pl. 9; Rex *v.* Smith, 2 Show. 165; United States *v.* Babcock, 4 McLean, 113; The State *v.* Carland, 3 Dev. 114; The State *v.* Hascall, 6 N. H. 352.

[6] Rex *v.* Richards, 7 D. & R. 665; s. c. nom. Rex *v.* Stephens, 5 B. & C. 246; Green *v.* The State, 41 Ala. 419; Cothran *v.* The State, 39 Missis. 541; Crim. Proced. II. § 917.

Mistake of Fact. — A mere mistake of the facts is not, therefore, enough.[1]

§ 1047. **Acting under Professional Advice.** — If a man makes a true statement to a lawyer who reduces it to writing, then swears to the writing under persuasion of this legal adviser, in whom he has confidence, that it does not differ from the oral representation, he cannot be convicted of perjury, though in fact the writing is wrong.[2] So, generally, if one states truly the facts to the writer of an affidavit, and adds his oath to it when drawn up, he does not commit perjury, though it is erroneously written by the amanuensis; "for," observed the judge, "the witness, in such case, has a right to believe that the affidavit was drawn according to his statements."[3] And in general terms, the corruption required in perjury may be negatived by showing that the party testified honestly under legal advice.[4] So —

Rash Swearing. — To swear rashly to what is not true is not necessarily perjury.[5]

§ 1048. **Specific Intent — (Intoxication).** — But the question of greatest difficulty is, whether, under all circumstances, a witness, to commit perjury, must have in his mind the specific intent to swear to what is not true. In a New York case, Walworth, while circuit judge, stated to the jury, that intoxication is no defence to a charge of perjury.[6] If this is universally so, the result is, that men may commit perjury without the specific intent.[7] On the other hand, Baldwin, J., once laid it down, that reckless disregard of truth, by a witness who has no belief that he is swearing falsely, will not constitute this offence; though his testimony

[1] Reg. *v.* Muscot, 10 Mod. 192, 195; Rex *v.* De Beauvoir, 7 Car. & P. 17; Reg. *v.* Fontaine Moreau, 11 Q. B. 1028; Commonwealth *v.* Cook, 1 Rob. Va. 729; The State *v.* Lea, 3 Ala. 602; Scott *v.* Cook, 1 Duvall, 314.

[2] United States *v.* Stanley, 6 McLean, 409. And see United States *v.* Conner, 3 McLean, 583; McLean, J., in this last case, observing: "The maxim is admitted, that ignorance of the law constitutes no excuse for the commission of a crime. But the intention with which the act is done must give a character to the act. A man may innocently commit homicide. If, in doing a lawful act, he should unintentionally kill a fellow-creature, he is in no sense guilty of a crime. A bankrupt . . . acts fairly in submitting the facts to his counsel, and, by acting under his advice, he shows a desire to conform to the law;" so that, if he makes a mistake by an omission from his schedule, he does not commit perjury.

[3] Jesse *v.* The State, 20 Ga. 156, 169, opinion by McDonald, J.

[4] Hood *v.* The State, 44 Ala. 81.

[5] United States *v.* Atkins, 1 Sprague, 558, explained in United States *v.* Moore, 2 Lowell, 232.

[6] People *v.* Willey, 2 Parker C. C. 19.

[7] See the chapter on Drunkenness, Vol. I. § 397 et seq.

is in fact false, and he would have made it true if he had used caution. This learned judge added: "His negligence or carelessness in coming to that belief or conclusion of the mind, without taking proper pains to enable him to ascertain the truth of the facts to which he swears, does not make his oath corrupt, and perjury cannot be *wilful* where the oath is according to the belief and conviction of the witness as to its truth."[1] And, on the whole, the doctrine best supported seems to be, as stated in the preceding volume, that the intent must be specific, to swear untruly.[2]

Swearing without Knowledge. — Consistently with the doctrine which requires a specific intent, it is held, that, if a man swears to a thing of which he is conscious he has no knowledge, he commits perjury;[3] "although," adds Reade, J., in a North Carolina case, "he believes it to be true, and although it turns out to be true."[4] For the declaration of a witness is, that he knows what he speaks to be true; and, if he is conscious he does not know it, he means to swear falsely, however the fact may turn out to be.

V. *English Statutes as Common Law in our States.*

§ 1049. **Common-law Offence.** — In an English case, Pollock, C. B., said: "Perjury was always an offence at common law."

Stat. Eliz. — He added: "The statute of Elizabeth defined the offence and increased the punishment."[5] It is 5 Eliz. c. 9, A. D. 1562. The Pennsylvania judges say, "it is in force except the 10th, 11th, 12th, and 13th sections, which are inapplicable to this commonwealth, and except the punishment by imprisonment, and paying of money, which is altered by our act of Assembly for reforming the penal laws."[6] In truth, this statute has been little used either in England or the American colonies; though, as the Pennsylvania judges in effect observe, it is doubtless, in a certain sense, common law in our country. The material parts of it, with

[1] United States *v.* Shellmire, Bald. 370, 378.

[2] Vol. I. § 320. "I agree, rather, with Mr. Bishop's opinion, that there must be some fact falsely stated, with knowledge of its falsity, before there can be perjury." Lowell, J., in United States *v.* Moore, 2 Lowell, 232, 235. And see Johnson *v.* People, 94 Ill. 505.

[3] The State *v.* Gates, 17 N. H. 373.

[4] The State *v.* Knox, Phillips, 312. See ante, § 1043.

[5] Reg. *v.* Gibbon, Leigh & C. 109, 111, 9 Cox C. C. 105.

[6] Report of Judges, 3 Binn. 595, 6. And see Roberts Dig. Stats. 359, who are the first nine sections of the statute. It contains, in all, thirteen sections.

expositions, may be found in Hawkins.[1] This learned writer observes: "Prosecutions upon this statute, being more difficult than by indictment at common law, are very seldom brought."[2]

1 Anne. — The statute of 1 Anne, stat. 2, c. 9, § 3, providing that witnesses for the defendant in treason and felony should be sworn the same as for the crown, made the false oath perjury. But, without this clause, the same would have been held on common-law principles.

§ 1050. **Further of English Statutes.** — We may, therefore, dismiss the old English statutes as being of little consequence, as to the law, in the United States. How they are, as to the procedure, we see elsewhere.[3]

VI. *American Statutes.*

§ 1051. **In General.** — In most of our States, perhaps all, there are statutes which define this offence, or provide for its punishment; and some of them increase a little its boundaries. Of the latter sort, is the New York statute.[4]

§ 1052. **Kentucky.** — In Kentucky: "If any person, in any matter which is or may be judicially pending, or on any subject in which he can be legally sworn, or on which he is required to be sworn, when sworn by a person authorized to administer an oath, shall wilfully and knowingly swear, depose, or give in evidence that which is untrue and false, he shall be confined," &c. It was observed: "This provision of the statute embraces, and was obviously intended to embrace, a large class of offences which did not amount to perjury at common law, and for which no punishment had been provided. And to constitute an offence of this class, it is not made necessary by the statute, either that the oath should be taken in a matter judicially pending at the time, or in a matter material to any point in question. The offence is complete if it be shown that the false oath was taken, knowingly and wilfully, on a subject on which the party could be legally sworn, and before a person legally authorized to administer the oath."[5]

[1] 1 Hawk. P. C. Curw. ed. p. 436 et seq., where also are given some subsequent English enactments.

[2] Ib. p. 437, note.

[3] Crim. Proced. II. § 901 et seq.

[4] See the observations of the commissioners in Draft of a Penal Code, 46 et seq.

[5] Commonwealth *v.* Powell, 2 Met. Ky. 10, 12, opinion by Duvall, J.

§ 1053. **Massachusetts.** — In Massachusetts: "Whoever, being required by law to take an oath or affirmation, wilfully swears or affirms falsely, in regard to any matter or thing respecting which such oath or affirmation is required, shall be deemed guilty of perjury."[1] But it is needless to follow these provisions, since each practitioner will consult the statutes of his own State.[2]

VII. *Remaining and Connected Questions.*

§ 1054. **Treason or Felony.** — "Before the Conquest," says Lord Coke, "perjury was punished, sometimes by death, sometimes by banishment, and sometimes by corporal punishment, &c."[3] But afterward the usual penalty of misdemeanor — imprisonment, fine, and the like — became universal; and, since then, if not always, this offence is at the common law misdemeanor, not felony.[4] In some of the States, as Georgia,[5] it is felony by force of the statutes.[6]

§ 1055. **Attempts.** — We have seen,[7] that perjury, though a substantive crime, partakes of the nature of attempt. Still the wrongful doing, to constitute the full offence, must proceed to a defined extent; and, where it has not gone so far, it may be indictable as an attempt,[8] on principles explained in the preceding volume.[9] Thus, —

False Affidavit — (Sworn to or not). — If one merely writes an affidavit, not sworn to or used, he is not guilty of the complete offence of perjury, however false it is;[10] though, if it is sworn to, being false, yet not tendered in court, he does become fully guilty.[11] Again, —

Oath before Unauthorized Person. — If one takes an oath before an officer not authorized to administer it, intending it shall be

[1] Gen. Stats. c. 163, § 2. And see Commonwealth *v.* Hughes, 5 Allen, 499.

[2] And see Stat. Crimes, § 571, 572.

[3] 3 Inst. 163.

[4] 3 Inst. 163; Case of False Affidavits, 12 Co. 128; Ryalls *v.* Reg. 13 Jur. 259, 18 Law J. N. S. M. C. 69; Rex *v.* Wallengen, 1 Sid. 106; Manney's Case, 12 Co. 101; Reg. *v.* Dunn, 12 Jur. 99; Rex *v.* Johnson, 2 Show. 1, 4; 2 Chit. Crim. Law, 313.

[5] A. *v.* B., R. M. Charl. 228.

[6] And see De Bernie *v.* The State, 19 Ala. 23. For the punishment in New Jersey, see Dodge *v.* The State, 4 Zab. 455.

[7] Vol. I. § 437.

[8] Reg. *v.* Stone, Dears. 251, 23 Law J. N. S. M. C. 14, 17 Jur. 1106, 22 Eng. L. & Eq. 593; post, § 1056.

[9] Vol. I. § 723 et seq.

[10] Rex *v.* Taylor, Holt, 534.

[11] Ante, § 1028.

used in a course of justice, he is punishable for an attempt, the same as if, the officer being authorized as he supposed him to be, he would then be for the offence complete.[1]

§ 1056. **Soliciting another to Perjury.** — If one solicits another to commit perjury, who does not, the solicitation is an indictable attempt,[2] according to principles already sufficiently discussed.[3] But —

Committing Perjury by Another. — If the person solicited commits the perjury, being a misdemeanor, a doctrine pervading all misdemeanors[4] renders the soliciting party guilty of the full offence of perjury, precisely as if committed directly by himself.[5] Perjury, committed by thus procuring another to do it, has been honored in our law by the separate name of —

Subornation of Perjury. — It is, in fact, mere perjury. But statutes, in some of the States, have expressly made it a separate offence.[6] A brief chapter will be devoted to it further on.

[1] Reg. *v.* Stone, supra.

[2] 1 Hawk. P. C. Curw. ed. p. 435, § 10; Rex *v.* Phillips, Cas. temp. Hardw. 241; Rex *v.* Johnson, 2 Show. 1, 2; Reg. *v.* Darby, 7 Mod. 100; Rex *v.* Margerum, Trem. P. C. 168.

[3] Vol. I. § 767, 768.

[4] Vol. I. § 685, 686.

[5] Vol. I. § 468; 1 Hawk. P. C. Curw. ed. p. 435; 3 Inst. 167; 2 Russ. Crimes, 3d Eng. ed. 596; Rex *v.* Johnson, 2 Show. 1, 4; Commonwealth *v.* Douglass, 5 Met. 241. And see United States *v.* Staats, 8 How. U. S. 41; Commonwealth *v.* Smith, 11 Allen, 243, 256.

[6] Commonwealth *v.* Smith, supra.

For PETIT LARCENY, see Vol. I. § 672, 680, 935, 942, 943, 974, 975. And see ante, LARCENY, particularly, § 757, 884.

CHAPTER XXXIV.

PIRACY.[1]

§ 1057. **By Law of Nations — Municipal Law.** — Piracy is an offence by the law of nations; and, moreover, the statutes of the United States make some acts piracy which are not such under the international law. The distinction is important.[2]

§ 1058. **Piracy by Law of Nations defined.** — Piracy, by the law of nations, is any act of forcible depredation on the high seas, committed in a spirit of general hostility to mankind, for gain or other private ends of the doers.[3]

[1] For matter relating to this title, see Vol. I. § 120, 306, 985.

[2] In re Ternan, 9 Cox, C. C. 522; Vol. I. § 120; post, § 1062.

[3] *Other Definitions, with Explanations,*—

Kent. — "Piracy is robbery, or a forcible depredation, on the high seas, without lawful authority, and done *animo furandi*, and in the spirit and intention of universal hostility. It is the same offence at sea with robbery on land; and all the writers on the law of nations, and on the maritime law of Europe, agree in this definition of piracy." 1 Kent Com. 183.

Lord Coke. — A pirate is "a rover and a robber upon the sea." 3 Inst. 113.

Leach — one of the editors of Hawkins: "A pirate is one who, to enrich himself, either by surprise or open force, sets upon merchants or others trading by sea, to spoil them of their goods or treasure." And again: "A pirate, at the common law, is a person who commits any of those acts of robbery and depredation upon the high seas, which, if committed on land, would amount to felony there." 1 Hawk. P. C. Curw. ed. p. 251, § 1, 3.

Russell — follows the last definition 1 Russ. Crimes, 3d Eng. ed. 94.

Sir Charles Hedges. — "Piracy is only a sea term for robbery, piracy being a robbery committed within the jurisdiction of the admiralty." Rex *v.* Dawson, 13 Howell St. Tr. 451, 454.

Lord Justice Mellish — delivering the opinion of the Privy Council — adopts the last definition. Attorney-General *v.* Kwok-a-Sing, Law Rep. 5 P. C. 179, 199, 8 Eng. Rep. 143, 161, 12 Cox, C. C. 565.

Exposition by Nelson, J. — In the early part of our secession civil war, in two instances privateersmen, acting by commission from the rebel government, were tried in the civil tribunals, not for piracy under the law of nations, but for a sort of statutory piracy, defined to be where "any person shall, upon the high seas, commit the crime of robbery, in or upon any ship or vessel, or upon any of the ship's company of any ship or vessel, or the lading thereof." In one of these cases, before the Circuit Court for the southern district of New York, Judge Nelson, with whom was associated Judge Shipman, concurring, said, among other things, to the jury. "It has already been determined by the highest authority, the Supreme Court of the United States, that we must look to the common law for

§ 1059. **By whom and against what.** — The common idea of a pirate is one who, in the words of Nelson, J., "roves the sea in an armed vessel, without any commission from any sovereign State, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet."[1] But, besides this, the mariners sailing a vessel may commit piracy upon it; as, if they "shall violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, or tackle, apparel, or furniture," feloniously.[2] And the passengers, doing the same, incur the like guilt.[3]

§ 1060. **Piracy under Law of Nations in United States.** — By the Revised Statutes of the United States: "Every person who, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterward brought into or found in the United

a definition of the term robbery; as it is to be presumed it was used by Congress in the act in that sense; and, taking this rule as our guide, it will be found the crime consists in this: the felonious taking of goods or property of any value from the person of another, or in his presence, against his will, by violence, or putting him in fear. . . . It need not be a taking which, if upon the high seas, would amount to piracy according to the law of nations, or what, in some of the books, is called general piracy or robbery. **Piracy by the Law of Nations defined.** — This is defined to be a forcible depredation upon property upon the high seas without lawful authority, done *animo furandi*, — that is, as defined in this connection, in a spirit and intention of universal hostility. A pirate [under the law of nations] is said to be one who roves the sea in an armed vessel, without any commission from any sovereign State, on his own authority, and for the purpose of seizing by force and appropriating to himself, without discrimination, every vessel he may meet. For this reason, pirates, according to the law of nations, have always been compared to robbers; the only difference being, that the sea is the theatre of the operations of one, and the land of the other. And as general robbers and pirates upon the high seas are deemed enemies of the human race, — making war upon all mankind indiscriminately, the crime being one against the universal laws of society, — the vessels of every nation have a right to pursue, seize and punish them. Now, if it were necessary on the part of the government to bring the crime charged in the present case against the prisoners within this definition of robbery and piracy, as known to the common law of nations, there would be great difficulty in so doing either upon the evidence, or perhaps upon the counts as charged in the indictment — certainly upon the evidence. For that shows, if any thing, an intent to depredate upon the vessels and property of one nation only, — the United States, — which falls far short of the spirit and intent, as we have seen, that are said to constitute essential elements of the crime. But the robbery charged in this case is that which the act of Congress prescribes as a crime, and may be denominated a statute offence as contradistinguished from that known to the law of nations." Savannah Pirates, Warburton's Trial of the Officers and Crew of the Privateer Savannah, p. 370, 371.

[1] See the last note.

[2] Rex *v.* Dawson, 13 Howell St. Tr. 451, 454, by Sir Charles Hedges, Judge of the Admiralty.

[3] Attorney-General *v.* Kwok-a-Sing, Law Rep. 5 P. C. 179, 200, 8 Eng. Rep. 143, 161.

States, shall suffer death."[1] Before the adoption of this revision in 1874, and with the exception of a brief period, our tribunals had no jurisdiction to punish piracies against the law of nations; though there were then, as now, statutory piracies bearing to it a considerable resemblance.[2]

[1] R. S. of U. S. § 5368.

[2] In an edition of this work published before the statutes were revised, it was stated as follows: The tribunals of the United States have no common-law jurisdiction. Vol. I. § 189 et seq. Piracy, therefore, being an offence committed out of the States, — unless, indeed, be excepted some localities which are both on the high seas and within a particular State, — cannot be punished, except under a statute enacted by Congress. On the third of March, A D. 1819, the following was adopted: "If any person or persons whatsoever shall, on the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall afterwards be brought into or found in the United States, every such offender or offenders shall upon conviction thereof, before the circuit court of the United States for the district into which he or they may be brought, or in which he or they shall be found, be punished with death." 3 U. S. Stats. at Large, c. 77, § 5, p. 510. But the next section provides, "That this act shall be in force until the end of the next session of Congress;" and, though other parts of it were afterward made perpetual, this section was not. Dunlop's Digest of the United States Laws, p. 598, note. It was, however, provided at the next session, that the foregoing section "is hereby continued in force, as to all crimes made punishable by the same, and heretofore committed, in all respects as fully as if the duration of the said section had been without limitation." Act of May 15, 1820, 3 U. S. Stats. at Large, c. 113, § 2, p. 600. And though we may perhaps infer, that the word "heretofore" was written by mistake of the engrosser for *hereafter*, yet thus it stands in every printed edition of the United States laws, one of which, if not all, was carefully read by the original rolls, is made by act of Congress evidence in court, and bears the highest marks of correctness. The provision simply authorized the courts to punish the offence if already committed. See Stat. Crimes, § 180. Stat. 1790, c. 9, § 8, creates an offence something like piracy, but I do not understand it to be the piracy of the law of nations. It provides "that, if any person, &c., shall commit upon the high seas, &c., murder or robbery, or any other offence which if committed within the body of a county would by the laws of the United States be punishable with death; or, if any captain or mariner of any ship or other vessel shall piratically and feloniously run away with such ship or vessel, or any goods or merchandise to the value of fifty dollars, or yield up such ship or vessel voluntarily to any pirate; or, if any seaman shall lay violent hands upon his commander, thereby to hinder and prevent his fighting in defence of his ship or goods committed to his trust, or shall make a revolt in the ship; every such offender shall be deemed, taken, and adjudged to be a pirate and felon, and, being thereof convicted, shall suffer death." Upon this an eminent legal person, to whom I am much indebted, writes me as follows: "In reviewing some questions of criminal law lately, it had occurred to me that you may have stated somewhat broadly, under the head of 'Piracy,' the idea that there is no act of Congress punishing that offence as an offence under the law of nations. The 8th section of the act of 1790, which it was intimated in United States *v.* Palmer, 3 Wheat. 610, could not apply to any but our own subjects, was afterwards in Klintock's Case, 5 Wheat. 144, held applicable to all pirates owning no lawful nationality. And in United States *v.* Pirates, 5 Wheat. 184, it was held this section was not repealed by the 5th section of the act of 1819. If so, then it would seem that as to most piratical sea-rovers we have sufficient legislation. The case of The Malek Adhel, 2 How. U. S. 210, was also one of piracy under the law

§ 1061. **Authorities, &c.** — The doctrine of piracy under the law of nations, therefore, has not been much illustrated in our courts. It is not best to enter further into the subject. But the reader is referred to some authorities which he may consult if occasion requires.[1]

§ 1062. **Statutes.** — Besides the statute already mentioned, conferring on the courts jurisdiction over piracy under the law of nations, we have provisions creating various statutory piracies.[2] But —

General View. — The reader will have these before him; and, when a question of piracy arises, sufficient time is given for a full examination, not only of the statutes, but the decisions.[3] Further expositions are not deemed necessary here.

§ 1063. **Conclusion.** — Under the title Treason, we shall enter into a consideration of various things, which, in some circumstances, may be illustrative of the law of piracy.

of nations if any thing. I have not found any subsequent change of statutes, but there may be something I have failed to notice."

[1] 1 Hawk. P. C. Curw. ed. p. 251; 2 East P. C. 792; 4 Bl. Com. 71; 3 Chit. Crim. Law, 1090; 1 Russ. Crimes, 3d Eng. ed. 94, and see the American note; 1 Gab. Crim. Law, 814; Roscoe Crim. Ev. 832; 2 Deac. Crim. Law, 1027; 3 Inst. 111; 3 U. S. Stats. at Large, p. 510, note. The reader may consult also the following cases: —

Cases of Common-law Doctrine, applied either in the construction of the statutes or otherwise. — The Marianna Flora, 11 Wheat. 1; United States *v.* Gibert, 2 Sumner, 19; United States *v.* Tully, 1 Gallis. 247; The Antelope, 10 Wheat. 66; United States *v.* Jones, 3 Wash. C. C. 209, 228; Adams *v.* People, 1 Comst. 173, 177; United States *v.* Pirates, 5 Wheat. 184; United States *v.* Palmer, 3 Wheat. 610.

Under English Statutes. — The Magellan Pirates, 18 Jur. 13, 25 Eng. L. & Eq. 595; Rex *v.* Curling, Russ. & Ry. 123; Reg. *v.* McGregor, 1 Car. & K. 429.

Under American Statutes and Treaties. — United States *v.* Jones, 3 Wash. C. C. 209; United States *v.* Tully, 1 Gallis. 247; United States *v.* Smith, 5 Wheat. 153; United States *v.* Pirates, 5 Wheat. 184; United States *v.* Palmer, 3 Wheat. 610; United States *v.* Klintock, 5 Wheat. 144; British Prisoners, 1 Woodb. & M. 66; United States *v.* Howard, 3 Wash. C. C. 340.

[2] R. S. of U. S. § 5369–5375.

[3] See, for these, the note to the last section.

For POLYGAMY, see Stat. Crimes.

CHAPTER XXXV.

PRISON BREACH, RESCUE, AND ESCAPE.[1]

§ 1064–1067. Introduction.
1068, 1069. These Several Offences viewed as Accessorial.
1070–1084. The Substantive Offence of Prison Breach.
1085–1091. The Substantive Offence of Rescue.
1092–1106. The Substantive Offence of Escape.

§ 1064. **Nature of this Subject.** — The three-fold subject of this chapter involves some complications of doctrine, and some doubts. The offences are analogous, and at points they blend, yet are not the same; the old books relating to them are obscure, and there are not sufficient modern adjudications to make ways which appear crooked straight. The consequence must be, that the chapter itself will seem less compact and satisfactory than most other parts of these volumes.

§ 1065. **Prison Breach defined.** — Prison breach is a breaking and going out of prison by one lawfully confined therein.

Rescue defined. — Rescue is a deliverance of a prisoner from lawful custody by any third person.[2]

Escape defined. — The word escape has two separate meanings in the law. The one is the allowing, voluntarily or negligently, of a prisoner lawfully in custody to leave his confinement. The other is the going away, by the prisoner himself, from his place of lawful custody, without a breaking of prison.

§ 1066. **Accessorial and Substantive.** — These offences are, in part, to be regarded in a double aspect. In the first place, the wrongful act, if it consists in aiding another, is often, not always, such as constitutes the doer an accessory after the fact to the

[1] For matter relating to these titles, see Vol. I. § 218, 316, 321, 359, 465, 639, 693, 695–697, 707. And see Stat. Crimes, § 217, 568. For the pleading, practice, and evidence, see Crim. Proced. II. § 940 et seq.

[2] Blackstone defines rescue to be "the forcibly and knowingly freeing another from an arrest or imprisonment." 4 Bl Com. 131.

crime of the person assisted. In the next place, the same act, while it is thus accessorial, is frequently, not always, a substantive crime also. That is, the thing done, which we are to contemplate in this chapter, may be what makes the one doing it an accessory after the fact, or it may be such as renders him guilty of a substantive offence, or it may be both of these together; in which last case, the indictment may charge it as being either the one or the other, at the election of the power which prosecutes.[1] This is a distinction of the highest importance; and some legal persons, overlooking it, have gone far astray in opinions relating to this subject.

§ 1067. **How the Chapter divided.** — We shall consider, I. These Several Offences viewed as Accessorial; II. Prison Breach; III. Rescue; IV. Escape; under which last three heads we shall contemplate the offence as substantive, looking at it occasionally also as accessorial.

I. *These Several Offences viewed as Accessorial.*

§ 1068. **Accessory After.** — We learn, from discussions in the preceding volume,[2] that an accessory after the fact, in a felony, is one who in any way aids the principal felon, whom he knows to be guilty of the felony. Hence, —

Helping to Escape. — As observed by Lord Hardwicke, "a man may become an accessory to a felony after the fact, by assisting a felon convict, being in custody under a sentence of transportation, to escape out of prison; provided it be such an assistance as doth in law amount to a receiving, harboring, or comforting such felon."[3]

§ 1069. **The Broader Doctrine.** — But this is only a particular form of aiding the felon; and the accessorial offence may be equally committed by any other assistance given him at any time after his felony is done, either by way of escape from confinement, or by harboring or concealing him, knowing of his guilt; it being immaterial whether he has been arrested, or otherwise proceeded against, or not.[4]

[1] Vol. I. § 696, 697.
[2] Vol. I. § 692.
[3] Rex *v.* Burridge, 3 P. Wms. 439, 485.
[4] The State *v.* Cuthbert, T. U. P. Charl. 13; Commonwealth *v.* Miller, 2 Ashm. 61.

II. *The Substantive Offence of Prison Breach.*

§ 1070. **Felony or Misdemeanor.** — This offence has already been defined.[1] Under the ancient common law, it was felony, whatever the cause of the imprisonment; provided, of course, that the imprisonment was lawful.[2] But, —

Stat. Edw. 2. — As felony was punishable by death, this was visiting too heavily a breaking away from confinement under a light sentence for some trivial offence. Accordingly the statute *de frangentibus prisonam*, 1 Edw. 2, stat. 2, ameliorated this severity where the imprisonment was for misdemeanor, by providing, "that none from henceforth that breaketh prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken and imprisoned did require such judgment, if he had been convict thereupon according to the law and custom of the realm, albeit in times past it hath been used otherwise."[3]

How in our States. — There is no room to doubt, that this statute is common law with us; and that, by force of it, combined with the anterior common law, any prisoner who frees himself from lawful imprisonment by breaking, commits thereby a felony or a misdemeanor, according as the imprisonment was for a crime of the one grade or the other.[4]

§ 1071. **Breaking without Exit.** — But a mere breaking is not sufficient to constitute this offence: the prisoner must make his exit also.[5]

Attempt. — Evidently, however, the mere breaking, done with the intent to escape, would constitute an indictable attempt.[6]

§ 1072. **Breaking from Civil Process.** — It cannot be stated, on the authority of the books, whether, to make a breaking and exit indictable, the imprisonment must be for crime, or whether it will be adequate if on mere civil process. There are utterances both ways.[7]

[1] Ante, § 1065.

[2] 2 Inst. 589; 1 Hale P. C. 607; Anonymous, 1 Dy. 99, pl. 60.

[3] For expositions of this statute, see 2 Inst. 589; 2 Hawk P. C. Curw. ed. 184; 1 Hale P. C. 608. And see Commonwealth *v.* Miller, 2 Ashm. 61.

[4] See 2 Hawk. P. C. Curw. ed. p. 183, § 1, p. 186 et seq. and § 21; 4 Bl. Com. 130; Rex *v.* Haswell, Russ. & Ry. 458.

[5] 2 Hawk. P. C. Curw. ed. p. 186, § 12.

[6] As to the doctrine of attempt, see Vol. I. § 723 et seq.

[7] Hawkins says, that, according to

§ 1073. **How in Principle.** — In reason, the administration of justice is an object of prime regard, as well in civil suits as in criminal. Hence perjury in a civil cause is indictable.[1] So is bribery.[2] So are tampering with witnesses and other acts of the like sort.[3] Therefore the helping of a person out of prison, or the breaking from confinement by the prisoner himself, should be deemed an offence as well when the imprisonment is in a civil cause as in a criminal.

§ 1074. **Imprisonment Unlawful.** — Where the imprisonment is unlawful, — either from want of a proper warrant of commitment, when a warrant is necessary, or because there is no lawful right to detain the prisoner without warrant, — the offence is not perpetrated, though the prison is broken. But, —

Lawful, yet not guilty. — If the imprisonment is lawful, though the party imprisoned is not guilty of what is laid to his charge, he commits this offence when he breaks the prison and escapes.[4]

§ 1075. **The Breaking.** — To constitute a prison breach, as distinguished from escape,[5] the prison must be broken. But —

Uncertain. — The doctrine on this question and some others is not distinct, being little discussed in the modern books. And if we turn to the old ones, evidently much in them, relating to the three heads of Prison Breach, Rescue, and Escape, is not correct as there stated; while, at the same time, we have not sufficient adjudications of a modern date to render valuable any exposition

the better opinion, before the statute *de frangentibus prisonam*, a prison breach was felony "if the party were lawfully in prison for any cause whatsoever, whether criminal or *civil*, and whether he were actually in the walls of a prison, or only in the stocks, or in the custody of any person who had lawfully arrested him." 2 Hawk. P. C. Curw. ed. p. 183, § 1. And Coke, perhaps favoring the same view, observes: "It appeareth, by our ancient authors of the law, that, if a prisoner, *whatsoever the cause was for which he was committed*, had broken the king's prison, and escaped out, it was felony." 2 Inst. 589. Also it was ruled at *nisi prius* in England, to be indictable at the common law for one to help a prisoner out of custody, though confined under the remand of the commissioners for the relief of insolvent debtors, not on any criminal charge. Reg. *v.* Allan, Car. & M. 295, 5 Jur. 296. And see Vol. I. § 466, 467. On the other hand, Escape, — Hawkins himself says, that for an *escape* to be indictable, the confinement "must be for a criminal matter; and," he even adds, "some are said to have holden that no escape is criminal but where the commitment is for felony." 2 Hawk. P. C. Curw. ed. 191, § 3. To make a distinction between escape and prison breach on this point is impossible. See post, § 1076.

[1] Ante, § 1024, 1026.

[2] Ante, § 85, 86.

[3] Vol. I. § 467, 468.

[4] 2 Hawk. P. C. Curw. ed. p. 185; 2 Inst. 590; Commonwealth *v.* Miller, 2 Ashm. 61. See also Rex *v.* Fell, 1 Ld. Raym. 424.

[5] Ante, § 1065; post, § 1092, et seq.

of the modern law, other than is contained in the foregoing sections.[1] Therefore —

Quotation from Gabbett. — A quotation from Gabbett will be helpful.[2]

§ 1076. **Stat. 1 Edw. 2, and its Construction.** — Gabbett[3] — let us cite his authorities with his text — says: "Breach of prison, or even the conspiracy to break it, was felony at the common law; for whatever cause, criminal or civil, the party was lawfully imprisoned;[4] but the severity of the common law was mitigated by the statute *de frangentibus prisonam*, 1 Edw. 2, St. 2.[5] So that to break prison and escape, when lawfully committed for any treason or felony, remains still felony at the common law; and to break prison when lawfully confined on any inferior charge, was, by this statute, punishable only as a high misdemeanor, by fine and imprisonment.[6] We must here notice the several points which have been ruled upon the construction of this statute.

§ 1077. **"What is a Prison, and a Lawful Imprisonment within Stat. 1 Edw. 2. St. 2.** — First, then, it is laid down as a clear principle, that any place whatsoever wherein a person under a lawful arrest for a supposed crime is detained, whether in the stocks, or in the street, or in the common jail, or the house of a constable or private person, is properly a prison within the meaning of the statute; for imprisonment is nothing else but a restraint of liberty; and the statute therefore extends as well to a prison in law as a prison in deed.[7] But the imprisonment must be a lawful one: and with respect to this point it is clear, that, if a person be taken upon a *capias* awarded on an indictment against him for a supposed treason or felony, he is within the statute if he break the prison, whether any such crime were or were not committed by him or any other person; for there is an accusation against him on record which makes his commitment lawful, however innocent he may be, and though the prosecution be ever so groundless.[8] And so if an innocent person be committed by a lawful *mittimus* on such a suspicion of felony, actually done by some other, as will

[1] Ante, § 1064.

[2] As to Gabbett's book, and why in a case like this I quote from it, see ante, § 506, note.

[3] 1 Gab. Crim. Law, 305 et seq.

[4] 1 Hale, 607-609; 2 Hawk. c. 18, § 1; 2 Inst. 589; 4 Bl. Com. 130.

[5] For this statute, see ante, § 1070.

[6] 4 Bl. Com. 130.

[7] 2 Hawk. c. 18, § 4; 2 Inst. 589. See ante, § 748.

[8] 2 Hawk. c. 18, § 5.

justify his imprisonment, though he be not indicted, he is within the statute if he break the prison; for, as he was legally in custody, he ought to have submitted to it till he had been discharged by due course of law.[1] But if no felony at all were done, and the party be not indicted, no *mittimus* for such a supposed crime will make him guilty, within the statute, for breaking the prison; his imprisonment being unjustifiable.[2]

§ 1078. "**How far the Offence depends upon the Nature or Lawfulness of the Mittimus.** — And though a felony were done, yet if there were no just cause of suspicion either to arrest or commit the party, his breaking of the prison will not be felony, if the *mittimus* be not in such form as the law requires: because the lawfulness of his imprisonment in such a case depends wholly on the *mittimus:* but if the party were taken up for such strong causes of suspicion of felony as will be a good justification of his arrest and commitment, it seems that it will be felony in him to break the prison, though he happen to have been committed by an informal warrant; for the necessity of a *mittimus* from a magistrate depends rather on the constant settled practice of justices of the peace, than any direct law: and therefore it seems difficult to maintain that the informality of such a *mittimus* should make it lawful for the prisoner to break the prison; when, by the ancient common law, any private person might, of his own authority, justify both an arrest and commitment for treason or felony, on a reasonable cause of suspicion.[3]

§ 1079. "**How far it depends upon the Nature of the Crime for which the Party is confined.** — As to the nature of the crime for which the party must be imprisoned, in order to make his breaking the prison felony within the meaning of the Statute 1 Edw. 2, it is clear, from the express words of the act, that, if the crime for which the party is charged in the *mittimus* do not require judgment of life or member, and the offence, in truth, be no greater than the *mittimus* doth suppose it to be, his breaking the prison will not amount to felony. And it is also clear, that, to make the prison breaking a felony, the offence for which the party was imprisoned must be a capital one at the time of his breaking the prison, and not become such by matter subsequent: as where A is committed to prison for a dangerous wound given

[1] 2 Hawk. c. 18, § 6.
[2] 2 Hawk. c. 18, § 7.
[3] 2 Hawk. c. 18, § 8; 1 Hale, 610.

to B, and breaks the prison, and then B dies; for though, to some intent, such offence be esteemed capital from the time of the first act, yet, as it was in truth but a trespass at the time of the breaking of the prison, and it was then uncertain whether it would ever become capital, and becomes such afterwards, *ab initio*, by fiction only, for some special purposes, such fiction shall not exclude the party from the advantages of this beneficial law (1 Edw. 2). Yet an offender breaking prison while it is uncertain whether his offence will become capital, is highly punishable for his contempt, by fine and imprisonment.[1] But it is not material, whether the offence for which the party was imprisoned were capital at the time of the passing of the statute (1 Edw. 2), or was made so by subsequent statutes; for the object of the statute was to restrain the common law (which made all breaches of prison felonies) to the cases of imprisonment for capital offences; and therefore, when an offence is made a capital one, it is as much out of the benefit of the statute (1 Edw. 2) as if it had been always so.[2] It is also to be observed, that, though the offence for which the party is committed be supposed, in the *mittimus*, to be of such a nature as requires a capital judgment, yet, if, in the event, it be found to be of an inferior nature, and not to require such a judgment, it seems that the breaking of the prison on a commitment for it cannot, by this statute, be felony; as the words are, 'except the cause for which he was taken and imprisoned require such a judgment.' And, on the other hand, if the offence which was the cause of the commitment be of such a nature as requires a capital judgment, but be supposed, in the *mittimus*, to be of an inferior degree, it will, as it seems, be felony within the meaning of the statute; since the fact for which he was arrested and committed, does in truth require judgment of life, though the nature or quality of the offence be mistaken in the *mittimus*.[3]

§ 1080. "A Party attainted is within the Statute. — A party actually attainted of the crime charged against him, who breaks his prison, is as clearly within the meaning of the statute, as one under an accusation only; though the offence of one already attainted, not requiring any second judgment, is not therefore

[1] 2 Hawk. c. 18, § 14.
[2] 2 Inst. 592; 2 Hawk. c. 18, § 13.
[3] 2 Hawk. c. 18, § 15.

within the precise words of the statute, namely, 'except the cause for which he was taken and imprisoned *require such a judgment*.' But the manifest meaning of the statute is, that the breaking of prison shall not be a capital offence, unless the crime for which the party was *in prison* be also a capital offence: — the makers of the statute could not intend a greater favor to persons actually attainted, and under the condemnation of the law, than to persons under an accusation only.[1]

§ 1081. **What Force is necessary to constitute a Prison Breaking.** — The next point for consideration is, what shall be said to be a breaking of prison within the meaning of the statute; and the rules upon this subject are, that there must be an actual breaking, or some real force or violence, and not such only as may be implied by construction of law: and, therefore, if without any obstruction a prisoner go out of the prison doors, being opened by the consent or negligence of the jailer, or otherwise escape, without using any kind of force or violence, he is guilty of a misdemeanor only.[2] In a recent case, where one Haswell, who was convicted of horse-stealing, made his escape from the house of correction, by tying two ladders together, and placing them against the wall of the yard; on the top of which wall was a range of bricks placed loose, and without mortar, some of which were thrown down by the prisoner (it was supposed accidentally) in getting over the wall, Mr. Baron Wood doubted, whether there was such force used as to constitute the crime of prison-breaking; or whether it amounted only to an escape; and, the point being reserved, the judges were unanimously of opinion that this was a prison-breaking, and punishable as a common-law felony.[3]

§ 1082. **The Breaking must be by or with the Privity of the Prisoner.** — Another rule is, that the breaking must be either by the prisoner himself, or by others through his procurement, or at least with his privity; for, if the prison be broken by others without his procurement or consent, and he escape through the breach so made, it seems that he cannot be indicted for the breaking, but only for the escape."[4]

§ 1083. **Cases of Necessity.** — "It is also to be understood, that the breaking must not be from a necessity arising out of an

[1] 2 Hawk. c. 18, § 16.
[2] 1 Hale, 611; 2 Hawk. c. 18, § 9.
[3] Rex *v.* Haswell, Russ. & Ry. 458.
[4] 2 Hawk. c. 18, § 10.

inevitable accident happening without any fault of the prisoner; as where the prison is set on fire by lightning, or otherwise without his privity, and he breaks it open to save his life."[1]

§ 1084. **Imprisonment for Petit Larceny.** — Another proposition in the books is, that, where the imprisonment is for petit larceny,[2] the breach of the prison is not felony.[3] It was held, however, to be felony in New York.[4]

III. *The Substantive Offence of Rescue.*

§ 1085. **How differs from Prison Breach — from Escape.** — We have already defined this offence.[5] It differs from prison breach only in this, that prison breach is by the prisoner himself, while rescue is by another; both prison breach and rescue bearing a common relation to escape by the prisoner, as the more aggravated forms of one offence. This appears to be the true statement, though there are passages in the books from which somewhat different views may be drawn.

How the Classification should be. — We see herein, that the law is not always wise in its classification of crimes; because, if it were, it would make but one offence of the three which stand at the head of this chapter; dividing it into breaking, whether by the prisoner or by a third person, which would be its aggravated form; and into escape and assisting the escape, which would be its milder form.

§ 1086. **Further of Classification.** — The books sometimes speak as though the only higher manifestation of the offence of rescue was prison breach. But, —

Breaking by Third Person — Prisoner escaping. — If there should be a case wherein the defendant had delivered from restraint a prisoner who did not concur in the act which freed him, and the prisoner should then take his liberty, clearly it would be rescue in this defendant, but in the prisoner only escape. Such indeed seems to be the doctrine of Hawkins.[6]

§ 1087. **Rescue as Accessorial.** — Moreover, Hawkins says, that,

[1] 2 Inst. 590; 1 Hale, 611. The foregoing extracts are from 1 Gab. Crim. Law, 305–308.

[2] Vol. I. § 679, 680, 935.

[3] 2 Hawk. P. C. Curw. ed. p. 187, § 15.

[4] People *v.* Duell, 3 Johns. 449. As to prison breach under the Massachusetts statute, see Commonwealth *v.* Briggs, 5 Met. 559.

[5] Ante, § 1065.

[6] 2 Hawk. P. C. Curw. ed. p. 186, § 10.

according to the better opinion, a man guilty of rescue cannot "be arraigned for such offence *as for a felony*, until the principal offender be first attainted," [1] — a rule which plainly does not apply to prison breach. And this is true where the rescuer is prosecuted for an accessorial crime, as before mentioned.[2] If, however, the imprisoned person and the rescuer were acting together, rendering mutual aid, they would be principals in one crime, and neither would be an accessory to the other.[3] Even under the most rigid rules of the common law, any principal can be punished in advance of any other.

§ 1088. **Compared with Escape, again — (Officer or not).** — A doctrine correct in principle is, that a rescue is committed by a person other than an officer, while an escape, of the kind not done by the prisoner himself, is always the act or neglect of an officer.[4] Yet there are intimations in the books, that a mere private individual may be guilty of the latter offence.[5] They can have no foundation in any just legal distinction; because the substantive escape rests, plainly, on the duty of the officer to discharge his official trust. But third persons, who are not officers, may undoubtedly become accessories at the fact to any kind of escape, whether by an officer or by the prisoner himself: [6] in other words, principals in the second degree; and, therefore, punishable in the same manner as the prisoner escaping, or the officer permitting him to escape.[7]

§ 1089. **Must be Exit from Prison.** — "As the party himself," says Hawkins, "seems not to be guilty of felony by breaking the prison, unless he go out of it, so neither is a stranger, unless the prisoner actually go out of the prison." [8] Yet, —

Attempt. — Though the act of breaking, with the intent to let the prisoner escape, may not be a technical rescue unless he does escape, it is indictable, nevertheless, as an attempt.[9]

§ 1090. **Felony or Misdemeanor.** — A rescue, where the restraint

[1] 2 Hawk. P. C. Curw. ed. p. 202, § 8. S. P. The State *v.* Cuthbert, T. U. P. Charl. 13.

[2] Ante, § 1068, 1069.

[3] Vol. I. § 648–650, 653.

[4] And see The State *v.* Errickson, 3 Vroom, 421.

[5] 2 Hawk. P. C. Curw. ed. p. 200.

[6] And see People *v.* Rathbun, 21 Wend. 509.

[7] See ante, § 1068, 1069; post, § 1101, note.

[8] 2 Hawk. P. C. Curw. ed. p. 202, § 3.

[9] The State *v.* Murray, 15 Maine, 100. See People *v.* Rathbun, 21 Wend. 509. And see concerning attempts, Vol. I § 723 et seq.

is for felony, is felony; and, where for misdemeanor, it is misdemeanor.[1]

§ 1091. **Mistake of Fact — (Rescue from Private Person).** — It is not an offence to rescue a prisoner from the hands of a private person, unless the one rescuing knows that the prisoner was under arrest for a felony or misdemeanor.[2]

IV. *The Substantive Offence of Escape.*

§ 1092. **Course of this Sub-title.** — Escape having been defined,[3] we shall first, for reasons already pointed out,[4] look at an extract from Gabbett,[5] with his authorities; then conclude the discussion with such further views as the few decisions in the modern books render practicable.

§ 1093. "**Escape defined and distinguished from Prison Breaking and Rescue.** — The escape of a person arrested upon criminal process, whether effected with or without force, before he is discharged by due course of law, is punishable as an offence against public justice. . . . And it is a clear principle of law, that an indictment will lie not only against the party who gains his liberty before he is legally discharged, but also against the officer by whose default, and from whose legal custody, he has been suffered to escape. It will lie against the party himself, because all persons are bound to submit themselves to the judgment of the law, and to be ready to be justified by it; and therefore whoever in any case refuses to undergo that imprisonment which the law thinks fit to put upon him, and frees himself from it by any artifice, before such time as he is delivered by due course of the law, is guilty of a high contempt, and punishable with fine and imprisonment.[6]

§ 1094. "**To constitute an Escape there must be an Actual Arrest, and a Legal and Continuing Imprisonment.** — To constitute an escape, it is however necessary that there shall have been an actual arrest; and therefore it has been holden that, if an officer, having a war-

[1] 4 Bl. Com. 131; 2 Hawk. P. C. Curw. ed. p. 202, § 6; Rex *v.* Stokes, 5 Car. & P. 148; Rex *v.* Haswell, Russ. & Ry. 458; Jenk. Cent. 171. And see Anonymous, 2 Salk. 586, Holt, 628; Rex *v.* Vaux, 11 Mod. 287; Rex *v.* Pember, Cas. temp. Hardw. 112; Anonymous, Dalison, 1.

[2] The State *v.* Hilton, 26 Misso. 199.

[3] Ante, § 1065.

[4] Ante, § 1075.

[5] 1 Gab. Crim. Law, 297 et seq.

[6] 2 Hawk. c. 17, § 5; Cro. Car. 210.

rant to arrest a man, see him shut up in a house, and challenge him as his prisoner, but never actually have him in his custody, and the party get free, the officer cannot be charged with an escape.[1] And, in the next place, the arrest must have been for some criminal matter which justifies the imprisonment; for, if the party be arrested for a supposed crime, where no such crime was committed (and the party not indicted for it); or for such a slight suspicion of an actual crime, and by such an irregular *mittimus*, as will neither justify the arrest nor imprisonment, — the officer is not guilty of an escape, by suffering the prisoner to go at large. And Serjeant Hawkins lays it down as a good general rule, that, wherever an imprisonment is so far irregular that it will be no offence in the prisoner to break from it by force, it can be no offence in the officer to suffer him to escape.[2] But, according to the same learned writer, if the warrant of commitment do plainly and expressly charge the party with treason or felony, and in other respects it be not strictly formal, yet it seems that the jailer suffering an escape is as much punishable as if the warrant were perfectly right; for it would be highly inconvenient to suffer jailers to take advantage of a slip of this kind in commitments; which, being generally made by persons of no great knowledge in the law, cannot be expected to be always agreeable to its forms; and, therefore, if they be good in substance, the public good seems to require that the jailer be as much bound to observe them as if they were never so exactly made.[3] To constitute this offence it is further essential, that the imprisonment shall be continuing at the time of the escape;[4] and such continuance must be grounded on that satisfaction which public justice demands for the crime committed; for, if a prisoner be acquitted and detained only for his fees, it will not be criminal to suffer him to escape, unless it be a part of the punishment; as where he is condemned to imprisonment for a certain time, and also until he pays his fees, as in such case he is not merely detained as a debtor.[5]

[1] 2 Hawk. c. 19, § 1.

[2] 2 Hawk. c. 19, § 2.

[3] 2 Hawk. c. 19, § 24.

[4] And see Rex *v.* Kelly, 1 Crawf. & Dix C. C. 203.

[5] Hawkins (vol. 2, c. 19, § 4) says, that this is to be intended where the fees are due to others as well as the jailer; for otherwise the jailer would be the only sufferer by the escape; and that it would be hard to punish him for suffering an injury to himself only, in the non-payment of a debt in his power to release

§ 1095. "**Negligent and Voluntary Escapes distinguished.** -- As to the distinction between voluntary and negligent escapes, there can be no doubt but that, wherever an officer who hath the custody of a prisoner charged with and guilty of a capital offence, doth knowingly give him his liberty, with an intent to save him either from his trial or execution, he is guilty of a voluntary escape, and thereby involved in the guilt of the same crime of which the prisoner was guilty, and stood charged with.[1] And it seems to have been the opinion of Lord Hale, that, in some cases, an officer may be adjudged guilty of a voluntary escape who had no intent to save the prisoner, but meant only to give him a liberty which by law he had no right to give;[2] but Serjeant Hawkins dissents from this opinion, and observes, that there are some cases wherein an officer has been found to have knowingly given his prisoner more liberty than he ought to have had (as by allowing him to go out of prison on a promise to return, or to go amongst his friends, to find some who would warrant goods to be his own which he is suspected to have stolen), and yet only adjudged guilty of a negligent escape; and he infers, that the judgment to be made of all offences of this kind must depend upon the circumstances of the case; such as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning to render himself to justice, the intention of the officer, and the motives on which he acted, &c.[3] But, in general, a negligent escape, as contradistinguished from a voluntary escape, is where the party arrested or imprisoned escapes against the will of him in whose custody or prison he is lawfully detained, and is not retaken before he has been lost sight of.[4]

§ 1096. "**An Escape implies the Negligence or Connivance of the Officer.** — And so strongly does the law incline to presume negligence in the officer where an escape occurs, that, though such prisoner should break jail, yet it seems that it will be deemed a negligent escape in the jailer; because it will be attributed to a want of due vigilance in the jailer or his officers:[5] and, upon the same principle, if a person in custody on a criminal charge, suddenly, and without the assent of the constable, kill, hang, or drown

[1] 2 Hawk. c. 19, § 10.
[2] See post, § 1104.
[3] 2 Hawk. c. 19, § 10.
[4] Dalt. c. 159, § 6.
[5] 1 Hale, 601.

himself, this is also considered as a negligent escape in the constable.[1] And not only is the jailer responsible for the security of the jail, and the safe custody of the prisoners, but a neglect in not keeping jails in a proper state of repair, by those who are liable to the burden of repairing them, appears, in many instances, to have been treated as an indictable offence, as tending to the great hinderance and obstruction of justice.[2] It seems, however, that the presumption of default in the jailer, in cases of escape, may be rebutted by satisfactory proof that all due vigilance was used, and that the jail was so constructed as to have been considered, by persons of competent judgment, a place of perfect security.[3]

§ 1097. "**What Officers are criminally responsible for the Escape of Prisoners.** — Whoever *de facto* occupies the office of jailer is liable to answer for a negligent escape: and it is in no way material whether or not his title to the office be legal: for the ill consequence to the public is the same in either case, and there seems to be no reason that a wrongful officer should have a greater favor than a rightful one.[4] It seems, however, that an indictment for a negligent escape will only lie against those officers upon whom the law casts the obligation of safe custody: and will not lie against the mere servants of such officers.[5] As to the case of a sheriff, he is as much liable to answer for an escape suffered by the jailer or bailiff (who are his officers or ministers) as if he had actually suffered it himself. But though a sheriff may be indicted for the offence of his jailer or bailiff (whether the escape was voluntary or negligent), and fined and imprisoned in respect thereof, yet where the jailer voluntarily suffers a felon to escape, it shall be felony only in the jailer, who was *immediately* intrusted with the custody, and not in the sheriff. And so a principal jailer is only *finable* for a voluntary escape suffered by his deputy; for no one shall suffer capitally for the crime of another; and, if a deputy jailer be not sufficient to answer (the fine) for a negligent escape, his principal must answer for him. And in the case of a justice of peace, if he bails a person not bailable by law, it is a negligent escape, for which he is finable at common law, and

[1] Dalt. c. 159, § 5.

[2] See the precedents 3 Chit. C. L. 668, 669; 4 Wentw. 363.

[3] 1 Russ. C. L. 371.

[4] 2 Hawk. c. 19, § 23. And see ante, § 392; Commonwealth *v.* Connell, 3 Grat. 587.

[5] 3 Burn (Chitty's) *Escape*, p. 5.

by the justices of jail delivery; and the jailer is in such case excused.[1]

§ 1098. "**Persons suffering Escapes, how proceeded against.** — Persons charged with having suffered escapes may be proceeded against by indictment or information; and, in some cases, the proceeding is a summary one in the nature of an attachment: as where, persons being present in a court of record are committed to prison by such court, if the keeper of the jail (who is bound to have them always ready when the court shall demand them) shall fail to produce them, the court will adjudge him guilty without further inquiry, unless he have some reasonable excuse; as that the prison was set on fire, or broken open by enemies, &c.; but, as to other prisoners who are not so committed, the jailer or other person who has them in custody is not punishable for their escape (except in some special cases) until it be presented.

§ 1099. "**When a Voluntary Escape amounts to Felony.** — We have already observed, that a voluntary escape[2] amounts to the same kind of crime as the offence of which the party was guilty, and for which he was in custody; and this will be the case, whether the person escaping were actually committed to some jail, or under an arrest only, and not committed; and whether he were attainted, or only accused of such crime and not indicted;[3] for the law communicates the crime of the offender to the person allowing him to escape. . . . And no escape will amount to a felony, unless the cause for which the party was committed were actually such at the time of the escape: and, therefore, if a jailer suffer one to escape who is committed for having given a dangerous wound to another who afterwards dies of such wound, yet he is not guilty of felony; for that the offence of the prisoner was but a trespass at the time of the escape; and though by a fiction of law it be afterwards, for some purposes, esteemed a felony from the time of the giving the wound, yet it shall be so construed in respect of those only who were privy to the wound.[4] It is also laid down, that a person who has suffered another to escape cannot be arraigned for such escape, as for felony, until the principal be attainted; on the ground that he is only punish-

[1] 1 Hale, 596; 2 Hawk. c. 19, § 19. See Vol. I. § 218–221, 316.

[2] That is, an escape knowingly suffered by an officer, and as against the officer.

[3] 2 Hawk. c. 19, § 22.

[4] 2 Hawk. c. 19, § 25

able in this degree as an accessory to the felony; and no accessory ought to be tried until the principal be attainted; but that he may be indicted and tried for a misprision or misdemeanor before any attainder of the principal offender; for, whether such offender were guilty or innocent, it was a high contempt to suffer him to escape.[1]

§ 1100. "**Punishment of Negligent Escapes.** — Whenever a person is found guilty, upon an indictment or presentment, of a negligent escape of a criminal actually in his custody, he ought to be condemned in a certain sum to be paid to the king; which is most properly to be called a fine: and it seems that, by the common law, the penalty for suffering the negligent escape of a person attainted was of course a hundred pounds; and, for suffering such escape of a person indicted and not attainted, was five pounds;[2] but if the person escaping were neither attainted nor indicted, that it was left to the discretion of the court to assess such a reasonable forfeiture as should seem proper: and if the party had twice escaped, it seems that the penalties above mentioned were of course to be doubled; yet that the forfeiture was to be no greater for suffering a prisoner committed on two several accusations to escape than if he had been committed but on one.[3] It is said that one voluntary escape amounts to a forfeiture of a jailer's office; and that if a jailer suffer many negligent escapes, he may also be ousted by the court.[4] And whereas persons indicted of felonies, after removing the indictments before the king, and yielding themselves to the marshals of the King's Bench, had been, incontinently, let to bail by the marshals, the 5 Edw. 3, c. 8, E. & I. enacts, that, if any such prisoner be found wandering out of prison, by bail or without bail, the marshal, being found guilty, shall have a year's imprisonment, and be ransomed at the king's will.

§ 1101. "**Escapes, when suffered by Private Persons, how punished.**[5] — A private person may be also guilty of an escape; and

[1] 2 Hawk. c. 19, § 26. But see the clause of 7 Geo. 4, c. 64, § 11, English, and 9 Geo. 4, c. 54, § 25, Irish. The doctrine of Mr. Gabbett's text on this last point cannot be correct; for a voluntary escape suffered by an officer must correspond to a prison breach by the prisoner. See ante, § 1070, 1071, 1074, 1085–1087.

[2] 2 Hawk. c. 19, § 31, 33; Hale, Sum. 113; Staundf. P. C. 35. But see 1 Hale, 604.

[3] 2 Hawk. c. 19, § 33.

[4] 2 Hawk. c. 19, § 30.

[5] See ante, § 1088.

is, in general, punishable in like manner as a jailer or other officer: and the general rule is, that wherever any person has another lawfully in his custody, whether upon an arrest made by himself or another, he is guilty of an escape, if he suffer him to go at large before he has discharged himself by delivering him over to some other who by law ought to have the custody of him.[1] And if a private person arrest another for suspicion of felony, and deliver him into the custody of another private person who receives him, and suffers him to go at large, it is said that both of them are guilty of an escape; the first, because he should not have parted [with] him till he had delivered him into the hands of a public officer; the latter, because, having charged himself with the custody of a prisoner, he ought at his peril to have taken care of him.[2] But where a private person, having made an arrest for suspicion of felony, delivers over his prisoner to the proper officer (as the sheriff or his bailiff, or a constable), from whose custody the prisoner escapes, such private person will not be chargeable. He cannot, however, excuse himself from the escape by alleging that he delivered the prisoner over to an officer, without showing to whom in particular, by name, he so delivered him, that the court may certainly know who is answerable.[3] And, as to the manner in which a private person is punishable for an escape, it is laid down that if it be voluntary, he is punishable in the same manner as an officer; and if it were negligent, he is punishable by fine and imprisonment, at the discretion of the court.[4]

§ 1102. **"Aiding Escapes, or Attempts to escape, how punished. —** As to aiding prisoners in escaping, or attempting to escape, it seems to be clear, that, by the common law, any assistance whatsoever given to one known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which

[1] 2 Hawk. c. 20, § 1; 1 Hale, 595.

[2] 2 Hawk. c. 20, § 2.

[3] 2 Hawk. c. 20, § 5.

[4] 2 Hawk. c. 20, § 6. There are many cases in which private persons, by the conduct mentioned in Mr. Gabbett's text, become accessories after the fact in the felony of the prisoner who is permitted to escape. But unless they are such accessories, or unless their act amounts to a rescue, they, having no legal duty to perform like that incumbent on officers of justice, clearly cannot be more heavily punished than can the prisoner whom they aid and abet at the fact be punished for the same escape. In this view they are punishable, but not as officers are; they are rather punishable as a woman is who aids a man in committing a rape. See ante, § 1088.

he is condemned, is sufficient to make the person giving such assistance an accessory after the fact to such felony: and the aiding and assisting any prisoner to escape out of prison, by whatever means it may be effected, or whatever be the nature of the offence with which such prisoner is charged, is an offence of a mischievous nature, and indictable as an obstruction to the course of justice."[1]

§ 1103. **Escape by Prisoner himself — (Misdemeanor).** — An escape by a prisoner himself is no more than a misdemeanor, whatever be the crime for which he is imprisoned. But this doctrine does not include prison breach;[2] it refers only to his walking away where there are no obstructions to prevent, as says Hawkins, "if, without any obstruction, a prisoner go out of the prison doors, being opened by the consent or negligence of the jailer, or otherwise escape without using any kind of force or violence, he is guilty of a misdemeanor only, but not of felony."[3]

§ 1104. **Consent of Keeper.** — The keeper of a prison, or other officer having a prisoner in custody, has no right to consent to an escape; and, if he does, the escaping prisoner is no less guilty.[4] Thus, —

Prisoner having Liberties given. — In Connecticut, where an imprisoned convict, by permission of his keeper, went about the land connected with the jail; went to market and brought thence provisions for the inmates; cooked for them in the kitchen of the dwelling-house attached to it; went to the adjacent barn, and there fed and milked the cow; and from the barn, without the jailer's knowledge, departed, — he was held, by the majority of the court, to be guilty of a criminal escape. Said the judge: "It was long ago decided by the Court of King's Bench in England, that, although a prisoner departs from prison with the keeper's license, yet it is an offence as well punishable in the prisoner as in the keeper.[5] That doctrine has never since been overruled, but often recognized as law."[6] Church, J., who dissented, was

[1] 2 Hawk. c. 20, § 26. The foregoing quotation is from 1 Gab. Crim. Law, p. 297–303.

[2] Ante, § 1070, 1076.

[3] 2 Hawk. P. C. Curw. ed. p. 186, § 9; 4 Bl. Com. 129, 130. Such an escape is prison breach in Scotland. Hutton's Case, 1 Swinton, 497.

[4] Commonwealth v. Sheriff, 1 Grant, Pa. 187. See Gano v. Hall, 42 N. Y. 67.

[5] Referring to Hobert's Case, Cro. Car. 209.

[6] Referring to The State v. Doud, 7 Conn. 384.

of opinion, that the prisoner should not be convicted unless, when he went to the barn, he meant to escape, and of this the jury should judge.[1]

Keeper granting Liberties. — A sentence to a prison means to the four walls of it; and, if the keeper permits a prisoner to go at large, he commits thereby the crime of escape;[2] unless, indeed, the statute authorizes, as it sometimes does, a range outside.[3] So a constable of the night is guilty of an indictable misdemeanor if he suffers to escape a street-walker, delivered to his custody by one of the nightly watch.[4]

§ 1105. **Felony or Misdemeanor.** — This has already been in part considered.[5] In cases not coming within a different rule, escape is felony or misdemeanor according as that for which the escaping prisoner was confined is the one or the other; and, at the common law, it is to receive the same punishment.[6]

§ 1106. **English and American Statutes.** — There are, on this subject, some English statutes later than 1 Edw. 2, stat. 2, *de frangentibus prisonam;*[7] and there are some American ones; but they seem not to require any special observation here.[8]

[1] Riley *v.* The State, 16 Conn. 47, majority opinion by Waite, J.

[2] Luckey *v.* The State, 14 Texas, 400; Smith *v.* Commonwealth, 9 Smith, Pa. 320; Nall *v.* The State, 34 Ala. 262. And see White *v.* The State, 13 Texas, 133.

[3] Schoettgen *v.* Wilson, 48 Misso. 253; Commonwealth *v.* Curley, 101 Mass. 24.

[4] Rex *v.* Bootie, 2 Bur. 864; s. c. nom. Rex *v.* Booty, 2 Keny. 575. See Brock *v.* King, 2 Jones, N. C. 302.

[5] Ante, § 1102, 1103.

[6] Weaver *v.* Commonwealth, 5 Casey, 445. **Punishment.** — And see, as to the punishment, Stevens *v.* Commonwealth, 4 Met. 360; Oleson *v.* The State, 20 Wis. 58; The State *v.* Doud, 7 Conn. 384.

[7] Ante, § 1070.

[8] See Rex *v.* Shaw, Russ. & Ry. 526; Rex *v.* Walker, 1 Leach, 4th ed. 97; Rex *v.* Greeniff, 1 Leach, 4th ed. 363; Reg *v.* Payne, Law Rep. 1 C. C. 27, 10 Cox C. C. 231; Kyle *v.* The State, 10 Ala. 236; Hughes *v.* The State, 1 Eng. 131; The State *v.* Bates, 23 Iowa, 96; Commonwealth *v.* Mitchell, 3 Bush, 30; Barthelow *v.* The State, 26 Texas, 175; Kavanaugh *v.* The State, 41 Ala. 399; People *v.* Tompkins, 9 Johns. 70.

For PROFANE SWEARING, see BLASPHEMY AND PROFANENESS.
PUBLIC MEETINGS, see DISTURBING MEETINGS.
PUBLIC SHOWS, see Vol. I. § 1145 et seq.
PUBLIC WAY, see WAY.

CHAPTER XXXVI.

RAPE.[1]

§ 1107. Introduction.
1108–1115. History and Definition.
1116, 1117. The Man who commits the Offence.
1118, 1119. The Woman on whom it is committed.
1120, 1121. Kind of Force necessary.
1122–1126. Consent which prevents Act from being Rape.
1127–1132. Carnal Knowledge necessary.
1133. Carnal Abuse of Children.
1134–1136. Remaining and Connected Questions.

§ 1107. **How the Chapter divided.** — We shall consider, I. History and Definition of the Offence; II. The Man who commits the Offence; III. The Woman on whom it is committed; IV. The Kind of Force necessary; V. The Consent which will prevent the Act from being Rape; VI. The Carnal Knowledge necessary; VII. Carnal Abuse of Children; VIII. Remaining and Connected Questions.

I. *History and Definition of the Offence.*

§ 1108. **Whether Statutory, or at Common Law.** — Rape is generally treated of, in England, as a statutory offence. In a certain sense it is so there; and, in another, it is there an offence at the common law. In our own country, it is, at least, an offence at the common law in the sense that the English statutes were accepted by the settlers as of common law force with them.

How in England. — Hale classes this offence among "felonies by act of Parliament." He proceeds: "Rape was anciently a felony, as appears by the laws of Adelstane mentioned by Bracton, lib. 3, and was punished by loss of life. But in process of

[1] For matter relating to this title, see Vol. I. § 259, 261, 373, 554, 746, 762, 788, 795, 808, 935. For the pleading, practice, and evidence, see Crim. Proced. II. § 947 et seq. And see, as to both law and procedure, Stat. Crimes, § 212, 318, 478–494, 505, 511, 643.

time that punishment seemed too hard; but, the truth is, a severe punishment succeeded in the place thereof, namely, castration, and the loss of the eyes, as appears by Bracton (who wrote in the time of Henry III.), lib. 3, c. 28. But then, though the offender was convict at the king's suit, the woman that was ravished, if single, might, if she pleased, redeem him from the execution, if she elected him for her husband, and the offender consented thereunto."[1]

§ 1109. **Stat. Westm. 1.** — The same authority informs us, that thus stood the law when Stat. Westm. 1 (3 Edw. 1, c. 13, A. D. 1275) was enacted, as follows: "The king prohibiteth, that none do ravish, nor take away by force, any maiden within age [that is, under twelve years[2]], neither by her own consent nor without, nor any wife or maiden of full age, nor any other woman against her will; and, if any do, at his suit that will sue within forty days the king shall do common right; and, if none commence his suit within forty days, the king shall sue; and such as be found culpable shall have two years' imprisonment, and after shall fine at the king's pleasure; and, if they have not whereof, they shall be punished by longer imprisonment, according as the trespass[3] requireth."

§ 1110. **How construed.** — Says Lord Hale: "This statute gives a punishment by imprisonment and ransom only, if attaint at the king's suit, and takes away castration and putting out of eyes; but, it seems, as to the suit of the party, if commenced within forty days, it alters not the punishment before."[4]

§ 1111. **Stat. Westm. 2.** — Thus we are at a period in the history of this offence when it was simply a misdemeanor punishable by fine and imprisonment. We are next to inquire what were the limits assigned it by the act which raised it to felony; that is, how it was therein defined. We have the answer in that part[5] of Stat. Westm. 2 (13 Edw. 1), c. 34, A. D. 1285, which is as follows: "If a man from henceforth do ravish a woman married, maid, or other, where she did not consent neither before nor after, he

[1] 1 Hale P. C. 626, 627.

[2] 2 Inst. 181, where Lord Coke says: "Here it shall be taken for her age of consent; that is, twelve years old, for that is her age of consent to marriage." And see 1 Bishop Mar. & Div. § 143 et seq.

[3] As to the meaning of the word trespass, see Vol. I. § 625.

[4] 1 Hale P. C. 627.

[5] For the entire statute, see ante, § 874, note.

shall have judgment of life and of member. [This clause refers particularly to the now obsolete semi-civil proceeding by appeal.[1]] And likewise where a man ravisheth a woman married, lady, damsel, or other, with force, although she consent after, he shall have such judgment as before is said [that is, of life and member[2]] if he be attainted at the king's suit, and there the king shall have the suit."[3]

§ 1112. **Stat. Eliz.** — By 18 Eliz. c. 7, § 4, it is, "for plain declaration of law," enacted, "that, if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, every such unlawful and carnal knowledge shall be felony, and the offender thereof being duly convicted shall suffer as a felon without allowance of clergy."

§ 1113. **How Rape defined.** — The effect of these several statutes will be more or less considered in subsequent parts of this chapter. But what is material in this connection is to consider what, according to these statutes, is the true definition of the felony of Rape. The following is, in substance, what is found in most of the books:[4] —

Common Form of Definition. — Rape is the having of unlawful carnal knowledge, by a man of a woman, forcibly and against her will.[5]

[1] 2 Inst. 433, 434.

[2] The meaning of which is, that "he shall be attainted of felony." 2 Inst. 434.

[3] Says Lord Coke: "Hereby it appeareth, that the first clause is to be intended of the suit of the party, this branch providing expressly for the suit of the king;" that is, for proceeding by indictment or information. 2 Inst. 434.

[4] And see Vol. I. § 554.

[5] **East.** — "Rape is the unlawful carnal knowledge of a woman by force and against her will." 1 East P. C. 434.

Lord Coke, in the 2d Institute, presents the following from the Mirror: "Rape is when a man hath carnal knowledge of a woman by force, and against her will." 2 Inst. 180. In the 3d Institute: "Rape is felony by the common law [the reader has seen, in the text, that this is not quite accurate], declared by Parliament for the unlawful and carnal knowledge and abuse of any woman above the age of ten years against her will [see as to children between the ages of ten and twelve, post, § 1133], or of a woman-child under the age of ten years with her will, or against her will, and the offender shall not have the benefit of clergy." 3 Inst. 60.

Lord Hale, referring to the place, 3d Inst. just cited, defines: "Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will." 1 Hale P. C. 628.

Hawkins. — "It seems that rape is an offence in having unlawful and carnal knowledge of a woman by force and against her will." 1 Hawk. P. C. Curw. ed. p. 122, § 2.

Blackstone. — Rape is "the carnal knowledge of a woman forcibly and against her will." 4 Bl. Com. 210.

Russell. — "Rape has been defined to be the having unlawful and carnal

§ 1114. **Definition compared with Statute.** — This definition is, in the main, in accord with the statute — namely, Westm. 2[1] — which had created and given limits to the felony. But, as to the mental condition of the woman at the time when the ravishment is committed, it departs from the statutory terms. Where the statute has "did not consent," it is in this definition "against her will;" and, under various circumstances, there is a great difference between the act done "against the will" of the woman, and the same act, simply, "where," to use the exact words of the statute, "she did not consent."[2]

§ 1115. **Corrected Form of the Definition.** — We shall have no occasion to inquire for the source of the old error. It may have arisen from copying definitions which existed anterior to the statute of Westm. 2, or from the mere accident of overlooking its exact words or not distinguishing them from the differing ones of the earlier statute of Westm. 1.[3] If the former supposition is correct, then the statute, enlarging the common law, should have led writers to enlarge the definition; if the latter, still the error remains obvious. Let us, therefore, bring the definition to the statutory terms; thus, — Rape is a ravishment by a man, of a woman, with force where she does not consent. Still the old form may be well enough if corrected at the point where, in sense, it departs from the statute; thus, — Rape is the having of unlawful carnal knowledge, by a man of a woman, forcibly, where she does not consent. And late English authorities sustain this correction of the definition.[4] If the carnal abuse of female chil-

knowledge of a woman by force and against her will." 1 Russ. Crimes, 3d Eng. ed. 675.

[1] Ante, § 1111.

[2] In Commonwealth *v.* Burke, 105 Mass. 376, the learned judge who delivered the opinion of the court undertakes to show, that the two expressions, "against her will" and "where she did not consent," mean exactly the same thing. This is a simple question of the significance of terms in the English language. To the minds of some people, there is a marked difference; if, to others, the expressions appear identical in meaning, the opinion is one not unlawful for them to hold. The question does not seem to require, or admit of, argument.

[3] Ante, § 1109.

[4] Reg. *v.* Camplin, 1 Den. C. C. 89, 1 Cox C. C. 220, 1 Car. & K. 746; Reg. *v.* Ryan, 2 Cox C. C. 115; Reg. *v.* Fletcher, Bell C. C. 63, 71, 8 Cox C. C. 131. In the last-cited case, Lord Campbell, C. J. said: "The question is, what is the real definition of the crime of rape, whether it is the ravishing of a woman *against her will*, or *without her consent*. If the former is the correct definition, the crime is not in this case proved; if the latter, it is proved. Camplin's Case seems to me really to settle what the proper definition is, and the decision in that case rests upon the authority of an act of Parliament. The statute of Westminster 2, c. 34, defines the crime to be where 'a man do ravish a woman, married, maid, or

dren is to be deemed rape, — and the question is merely one of name, — then the definition needs enlarging to meet also this case.

II. *The Man who commits the Offence.*

§ 1116. **Physical Capacity.** — Rape can be committed only where there is a physical capability in the direct perpetrator.[1] But we shall see, by and by,[2] that one not capable may become guilty of it, as a principal offender, by abetting another who is.

§ 1117. **Under Fourteen years.** — According to the English doctrine, a boy under fourteen is conclusively presumed to be incapable, whatever be the real fact.[3] It is so, also, in North Carolina.[4] The reason is, that puberty does not often develop itself at an earlier period; and so this rule works justice in most cases, while its conclusive nature prevents those indecent disclosures which tend to the corruption of public virtue.[5] In this country generally, the rule has been little discussed: but some courts have held, that it is to be received only to establish a *prima facie* case, which may be overthrown by actual testimony.[6] We can

other, *where she did not consent, neither before nor after.*' [As we have seen, ante, § 1111, 1114, this statement is not precisely accurate. The consent given afterward would avail the ravisher on a proceeding by appeal, but not on an indictment.] We are bound by that definition, and it was adopted in Camplin's Case, acted upon in Ryan's Case, and subsequently in a case before my brother Willes. It would be monstrous to say, that, if a drunken woman returning from market lay down and fell asleep by the roadside, and a man, by force, had connection with her, whilst she was in a state of insensibility, and incapable of giving consent, he would not be guilty of rape." [Held not to be rape, in People *v.* Quin, 50 Barb. 128; but held to be rape in Commonwealth *v.* Burke, 105 Mass. 376.] And Martin, B., observed: "I am quite content to take the definition of rape as we find it in the statute." See also, post, § 1120–1124 and notes. Now, as this statute is a part of the common law of our States, the definition needs rectifying here as much as it did in England. Massachusetts View. — In Commonwealth *v.* Burke, supra, Gray, J., who delivered the opinion of the court (see, ante, § 1114, note), was of opinion that "where she did not consent," in Westm. 2, meant the same thing as "against her will" in Westm. 1. The effect of the opinion is, that the amended definition is correct for those who can see a difference in the two forms of expression; while yet, in truth, "against her will" does not mean *against*, but *without* her will.

[1] Nugent *v.* The State, 18 Ala. 521.

[2] Post, § 1153.

[3] Vol. I. § 373, 554, 746; Reg. *v.* Philips, 8 Car. & P. 736; Reg. *v.* Jordan, 9 Car. & P. 118; Reg. *v.* Brimilow, 9 Car. & P. 366, 2 Moody, 122; Rex *v.* Groombridge, 7 Car. & P. 582.

[4] The State *v.* Sam, Winston No. 1, 300. The point of the case was, that the boy cannot be guilty of the attempt. And see Vol. I. § 746.

[5] See 1 Bishop Mar. & Div. § 146.

[6] Vol. I. § 373; Williams *v.* The State, 14 Ohio, 222; Hiltabiddle *v.* The State, 35 Ohio State, 52; People *v.* Croucher, 2 Wheeler Crim. Cas. 42; People *v.* Randolph, 2 Parker C. C. 174. See The State *v.* Handy, 4 Harring. Del. 566.

hardly suppose the instances of physical capability exhibited at an earlier age than fourteen years, in a boy, sufficiently numerous to call for the abolition of a technical rule so well adapted as this to prevent those particular statements of indecent things which wear away the nice sense of the refined, placed, by the Maker, in the human mind as one of the protections of its virtue.

III. *The Woman on whom the Offence is committed.*

§ 1118. **Age.** — Woman's physical nature is earlier developed than man's. Therefore legal puberty is fixed in her at twelve, where in him it is fourteen.[1] But puberty of the female is not essential in rape; though, at the common law, the question was a little in doubt when she was under ten. Plainly enough, however, the girl is never too young, provided this offence is in fact committed on her.[2]

§ 1119. **Unchaste Woman.** — This offence may be committed as well on a woman unchaste, or a common prostitute, as on any other female.[3] In matter of evidence, however, want of chastity may, within recognized limits, be shown as rendering it more probable that she consented.[4]

Wife. — But a husband does not become guilty of rape by forcing his wife to his own embraces; though, if he is present abetting another man who forces her, he does.[5]

IV. *The Kind of Force necessary.*

§ 1120. **Question complicated with that of Consent.** — The question of the force necessary complicates itself with that of the consent which prevents the act from being rape. Thus, —

[1] 1 Bishop Mar. & Div. § 143–146.

[2] 1 Hale P. C. 630, 631; Rex *v.* Brasier, 1 Leach, 4th ed. 199, 1 East P. C. 435, 1 Gab. Crim. Law, 833, 4 Bl. Com. 214; Reg. *v.* Neale, 1 Car. & K. 591, 1 Den. C. C. 36; 1 Hawk. P. C. Curw. ed. p. 122, § 4; Hays *v.* People, 1 Hill, N. Y. 351; Stephen *v.* The State, 11 Ga. 225; Reg. *v.* Rearden, 4 Fost. & F. 76. See Stat. Crimes, § 211; Sydney *v.* The State, 3 Humph. 478. Under the differing forms of our statutes, this question may be the one way or the other according to their terms. And see Fizell *v.* The State, 25 Wis. 364; Blackburn *v.* The State, 22 Ohio State, 102; Stat. Crimes, § 487.

[3] 1 Hawk. P. C. Curw. ed. p. 122, § 7; Pleasant *v.* The State, 15 Ark. 624; Rex *v.* Barker, 3 Car. & P. 589; Pleasant *v.* The State, 8 Eng. 360; Wright *v.* The State, 4 Humph. 194; Higgins *v.* People, 1 Hun, 307.

[4] Crim. Proced. II. § 965, 966; Woods *v.* People, 55 N. Y. 515; Reg. *v.* Hallett, 9 Car. & P. 748.

[5] 1 Hale P. C. 629. See ante, § 1116, 1117; post, § 1135.

Fraud. — We shall see, under our next sub-title, that, if a consent to the connection is given, it protects the man on a charge of rape, even if he obtained it by some fraud. Now, were the law not so, but were the consent thus procured void *as consent*, still, where it exists, there is probably not the force which is an ingredient in rape.[1] Yet, —

Force involved in the Act. — Wherever there is a carnal connection and no consent in fact, fraudulently obtained or otherwise, there is evidently, in the wrongful act itself, all the *force* which the law demands as an element of the crime. For example, —

§ 1121. **Connection with Idiotic Woman.** — A woman with less intellect than is required to make a contract may so consent to a carnal connection that it will not be rape in the man.[2] But, if she is so idiotic as to be absolutely incapable of consent or dissent, and the man does not suppose he has her consent, the connection with her is rape.[3] If more of force were required than is involved in the carnal act, this could not be so. Again, —

Woman Unconscious from Drink. — "If," said the learned judge to the jury in one case, the woman "was in a state of unconsciousness at the time the connection took place, whether it was produced by the act of the prisoner or by any act of her own, any one having connection with her would be guilty of rape. If she was in a state of unconsciousness, the law assumes that the connection took place without her consent, and the prisoner is guilty of the crime charged."[4] An illustration of this occurs where she is so drunk as not to know what is done.[5]

V. *The Consent which will prevent the Act from being Rape.*

§ 1122. **Condition of the Authorities.** — Most of the cases on this head arose when it was supposed the carnal act must be "against the will" of the woman, instead of being simply "without her consent."[6] The consequence has been, that, in some instances,

[1] And see Kelly *v.* Commonwealth, 1 Grant, Pa. 484; Lewis *v.* The State, 30 Ala. 54; People *v.* Royal, 53 Cal. 62; McNair *v.* The State, 53 Ala. 453; The State *v.* Riggs, 1 Houst. Crim. 120; and various cases cited post, § 1122–1124.

[2] Post, § 1123; Reg. *v.* Fletcher, Law Rep. 1 C. C. 39; Bloodworth *v.* The State, 6 Baxter, 614; The State *v.* Atherton, 50 Iowa, 189, 191.

[3] The State *v.* Tarr, 28 Iowa, 397; Reg. *v.* Barratt, Law Rep. 2 C. C. 81, 12 Cox C. C. 498; Reg. *v.* Fletcher, Bell C. C. 63; Reg. *v.* Connolly, 26 U. C. Q. B. 317. See post, § 1122–1124 and note; Reg. *v.* Ryan, 2 Cox C. C. 115.

[4] Reg. *v.* Ryan, supra.

[5] Commonwealth *v.* Burke, 105 Mass. 376; ante, § 1115, note.

[6] Ante, § 1114, 1115.

the act has been held not to be rape where the result would have been the other way if the amended definition had been in the minds of the judges. But we cannot absolutely reject all these cases as authorities. Moreover, in many of our States, the statutes define rape in the terms of the old common-law definition.

Will overcome by Fraud. — Where the woman consents in fact to the connection, it is not rape in the man, though he obtained her consent by persuasion or even by fraud.[1] Thus, —

Personating Husband. — A man who gets into bed with a married woman, meaning she shall believe him to be her husband, does not commit rape when, so mistaking, she admits him to connection.[2] But if she is asleep, and he knows it, she can give no consent; then a connection with her, thus unconscious, will be rape, within a principle above stated.[3] Again, —

Trick of Medical Practitioner. — If a medical practitioner represents to a woman that a copulation is necessary as a part of his treatment of her case, and she consents through faith in his representation, the act is not rape. Though her consent was obtained by fraud, still she consented.[4] But if she consents to a surgical operation, and he has connection while she thinks he is performing it, this is rape.[5]

Woman's Will opposed. — It is plain, that, in the ordinary case, where the woman is awake, of mature years, of sound mind, and not in fear, a failure to oppose the carnal act is consent. And though she objects verbally, if she makes no outcry and no resistance, she by her conduct consents, and the carnal act is not rape in the man.[6] Some of the cases, both old and modern, are quite too favorable to the ravishers of female virtue, and ought not to

[1] The State *v.* Burgdorf, 53 Misso. 65; Clark *v.* The State, 30 Texas, 448; Walter *v.* People, 50 Barb. 144.

[2] Reg. *v.* Clarke, Dears. 397, 18 Jur. 1059, 29 Eng. L. & Eq. 542; Rex *v.* Jackson, Russ. & Ry. 487; Reg. *v.* Williams, 8 Car. & P. 286; Reg. *v.* Saunders, 8 Car. & P. 265; Reg. *v.* Barrow, Law Rep. 1 C. C. 156 (questioned in Reg. *v.* Flattery, infra); Reg. *v.* Francis, 13 U. C. Q. B. 116; Wyatt *v.* The State, 2 Swan, Tenn. 394; Lewis *v.* The State, 30 Ala. 54. And see Sullivant *v.* The State, 3 Eng. 400; Commonwealth *v.* Fields, 4 Leigh, 648; People *v.* Bartow, 1 Wheeler Crim. Cas. 378. But see The State *v.* Shepard, 7 Conn. 54; Anonymous, 1 Wheeler Crim. Cas. 381, note. As to the Scotch law, see Fraser's Case, Arkley, 329; Reg. *v.* Sweenie, 8 Cox C. C. 223.

[3] Ante, § 1121; Reg. *v.* Mayers, 12 Cox C. C. 311, 4 Eng. Rep. 559; Reg. *v.* Young, 14 Cox C. C. 114. This distinction has not always been in the mind of the court, as see cases in last note, and Reg. *v.* Lock, Law Rep. 2 C. C. 10, 12 Cox C. C. 244.

[4] Don Moran *v.* People, 25 Mich. 356; Walter *v.* People, 50 Barb. 144. See ante, § 36.

[5] Reg. *v.* Flattery, 2 Q. B. D. 410.

[6] Reynolds *v.* People, 41 How. Pr. 179.

be followed, on this question of resistance. Thus, in New York, where a man had locked his servant girl of fourteen in a barn and had connection with her, a verdict against him for rape was set aside because the judge at the trial had refused to charge the jury, that, to convict him, they must be satisfied she "resisted the defendant to the extent of her ability," though he did tell them that "the act must have been done by force and against her will and resistance." Said the learned judge in the Court of Appeals: "The resistance must be up to the point of being overpowered by actual force, or of inability from loss of strength longer to resist, or from the number of persons attacking resistance must be dangerous or absolutely useless, or there must be dread or fear of death."[1] In various other cases it is stated, in pretty distinct terms, that the will of the woman must oppose the act, and that any inclination favoring it is fatal to the prosecution.[2] The latter terms are, under the facts of the ordinary case, not repugnant to good doctrine; and the strong New York view might not be very objectionable in a barbarous age; but, in our age, to compel a frail woman, or girl of fourteen, to abandon her reason, and measure all her strength with a robust man, knowing the effect will be to make her present deplorable condition the more wretched yet not to preserve her virtue, on pain of being otherwise deemed a prostitute instead of the victim of an outrage, — is asking too much of virtue and giving too much to vice. The *text of the law*, we have seen,[3] and, it is believed, the better judicial doctrine, requires only that the case shall be one in which the woman "did not consent." Her resistance must not be a mere pretence, but in good faith.[4]

[1] People *v.* Dohring, 59 N. Y. 374, 382, opinion by Folger, J. An instruction, that the woman must make what seemed to her every available endeavor to prevent the ravishment would be unobjectionable in legal principle. If she did not in fact consent, she would do this. But, if her refusal to consent was honest, and she was in "dead earnest" therein, she might resort to remonstrance, to promises, or to a variety of other means, rather than to an expenditure of physical strength which she knew would be useless.

[2] Reg. *v.* Hallett, 9 Car. & P. 748; The State *v.* Murphy, 6 Ala. 765; Pleasant *v.* The State, 8 Eng. 360; Woodin *v.* People, 1 Parker C. C. 464; People *v.* Morrison, 1 Parker C. C. 625, 643; Pollard *v.* The State, 2 Iowa, 567. And see Charles *v.* The State, 6 Eng. 389; Strang *v.* People, 24 Mich. 1; Don Moran *v.* People, 25 Mich. 356.

[3] Ante, § 1111; Reg. *v.* Jones, 4 Law Times, N. S. 154; Commonwealth *v.* McDonald, 110 Mass. 405; The State *v.* Cross, 12 Iowa, 66; Crockett *v.* The State, 49 Ga. 185; The State *v.* Shields, 45 Conn. 256.

[4] Reg. *v.* Rudland, 4 Fost. & F. 495.

Consent during Part of Act. — There are intimations, in some of the cases, that a consent given during any part of the intercourse will prevent the act being rape.[1] If it is given after the assault, but before the penetration, it will ;[2] but, on principle, when the offence has been made complete by penetration,[3] no remission by the woman or consent from her, however quickly following, can avail the man.[4] And the statute of Westm. 2 is express, that the liability to punishment shall remain "although she consent after."[5]

§ 1123. **Woman non compos.** — We have seen,[6] that, if the woman is *non compos*, and so neglects to oppose because she has no intelligent will, the intercourse with her, when there is nothing which may be called for the purpose a consent, is rape.[7] But even such a woman, unless indeed the idiocy is very profound, may consent.[8] And, if the capacity to consent exists, it must in some way appear that she did not consent, or the connection with her will not be rape.[9] But this will depend much on the circumstances of the case, and the want of consent may sufficiently appear from the nature and extent of the idiocy itself.[10] As to what is a consent, by a woman of weak mind or idiotic, it must, on principle, in her case the same as in that of any other female, be a yielding of the will, and not of the mere animal instincts. But there is probably no decision to this exact proposition ; and some cases indicate that the concurrence of the woman's mere animal passions with the act will prevent its being rape.[11]

§ 1124. **Young Girl.** — If the girl is very young,[12] and of mind

[1] Commonwealth *v.* McDonald, supra ; Brown *v.* People, 36 Mich. 203 ; Whittaker *v.* The State, 50 Wis. 518. See Reg. *v.* Page, 2 Cox C. C. 133.

[2] Reg. *v.* Hallett, 9 Car. & P. 748.

[3] Post, § 1132.

[4] Vol. I. § 733.

[5] Ante, § 1111. And see post, § 1125, note.

[6] Ante, § 1121.

[7] Vol. I. § 261 ; Rex *v.* Ryan, 2 Cox C. C. 115 ; The State *v.* Crow, 10 West. Law Jour. 501.

[8] Reg. *v.* Pressy, 10 Cox C. C. 635 ; Reg. *v.* Ryan, 2 Cox C. C. 115.

[9] Reg. *v.* Fletcher, Law Rep. 1 C. C. 39.

[10] The State *v.* Tarr, 28 Iowa, 397 ; Reg. *v.* Connolly, 26 U. C. Q. B. 317 ; Reg. *v.* Barratt, Law Rep. 2 C. C. 81, 12 Cox C. C. 498 ; Reg. *v.* Ryan, 2 Cox C. C. 115. And see Reg. *v.* Pressy, 10 Cox C. C. 635.

[11] Reg. *v.* Fletcher, Law Rep. 1 C. C. 39 ; Reg. *v.* Fletcher, Bell C. C. 63 ; Reg. *v.* Connolly, 26 U. C. Q. B. 317 ; McNamara's Case (Scotch), Arkley, 521, 524. And see Reg. *v.* Ryan, supra. Where, in Michigan, the woman was of mature years, of good size and strength, yet in a state of *dementia*, — not idiotic, but approaching toward it, — and the man used no fraud or force, it was adjudged not rape. Crosswell *v.* People, 13 Mich. 427. See The State *v.* Atherton, 50 Iowa, 189.

[12] Not now speaking of carnal abuse post, § 1133.

not enlightened on the question, this consideration will lead the court and jury to demand less clear opposition than in the case of an older and intelligent female, or even lead them to convict where there was no apparent opposition.[1] So, —

Making Drunk. — Where the prisoner had given a girl, thirteen years of age, liquor to excite her; and, on her becoming drunk, had violated her while she was insensible to what he did; he was held to have committed rape.[2] But, we have seen,[3] this case does not extend to the verge of the law; it would be equally rape though the female had been of mature years, and the defendant had not administered the liquor.

§ 1125. **Consent through Fear.** — A consent induced by fear of personal violence is no consent; and, though a man lay no hands on a woman, yet, if by an array of physical force he so overpowers her mind that she dares not resist, he is guilty of rape by having the unlawful intercourse.[4]

§ 1126. **Ether or Chloroform.** — The subject of rape has given rise to many questions of medical jurisprudence, not within the scope of these volumes. One of these relates to the effects of ether and of chloroform, as deadening the sensibilities, impairing the will, incapacitating the woman truly to note and afterward describe what is done, and the like. Of cases of considerable interest on this question, there are two, — the one, where ether was charged to have been administered, occurring in Pennsylvania, and the other, an Ohio case, where the alleged agent was chloroform.[5] It is doubtless sound legal doctrine, and is not denied, that, as laid down by Lawrence, J., in the Ohio case,[6] where a woman has chloroform, for example, given her by a man to bring about with her a carnal intercourse to which she would

[1] Reg. *v.* Case, Temp. & M. 318, 1 Den. C. C. 580, 4 New Sess. Cas. 347, 14 Jur. 489, 19 Law J. N. S. M. C. 174, 1 Eng. L. & Eq. 544; Stephen *v.* The State, 11 Ga. 225; The State *v.* Cross, 12 Iowa, 66; Reg. *v.* Jones, 4 Law Times, N. S. 154. And see Reg. *v.* Day, 9 Car. & P. 722; Reg. *v.* Lock. Law Rep. 2 C. C. 10, 12 Cox C. C. 244; Reg. *v.* Page, 2 Cox C. C. 133.

[2] Reg. *v.* Camplin, 1 Den. C. C. 89, 1 Car. & K. 746.

[3] Ante, § 1121.

[4] Pleasant *v.* The State, 8 Eng. 360; Reg. *v.* Hallett, 9 Car. & P. 748; Reg. *v.* Day, 9 Car. & P. 722; Reg. *v.* Jones, 4 Law Times, N. S. 154. In Wright *v.* The State, 4 Humph. 194, the court held the following instruction to the jury to be correct in all its parts: "It is no difference if the person abused consented through fear, or that she was a common prostitute, or that she assented after the fact, or that she was taken first with her own consent, if she were afterward forced against her will."

[5] Whart. & Stil. Med. Jur. 2d ed § 443, 459.

[6] The State *v.* Green, Ib. § 459.

not otherwise consent, then, if she "had the capacity to hear, feel, and remember, and a capacity to speak and forcibly resist, but the inclination to do so was lost, the will overcome by the action of chloroform, either operating upon the *will* faculty, or the *judgment* and *reflective* faculties (or sexual emotions), so that the mind was thereby incapable of fairly comprehending the nature and consequences of sexual intercourse, and the defendant, knowing these facts, had unlawful carnal knowledge of her, forcibly, that would be rape. And it would, in such a case, be wholly immaterial whether the entire mind was disordered and overthrown, or only such faculties thereof as are rendered incapable of having just conceptions, and drawing therefrom correct conclusions in relation to the alleged rape."

VI. *The Carnal Knowledge necessary.*

§ 1127. **In Brief.** — There must be penetration; there need not be emission. But the following explanations are desirable.

Emission — (Sodomy and Rape). — The question, in rape, has been decided differently by different tribunals. According to Lord Hale, this ingredient is not necessary;[1] and there appears to have been no contrary adjudication at the time he wrote. But Lord Coke had said, that emission is essential in sodomy, so decided "in the case of Stafford, who was attainted in the King's Bench and executed;"[2] adding: "In rape there ought to be penetration and emission of seed."[3] But, though writers generally assume that rape and sodomy stand on common ground, reflection may suggest differences. In a subsequent case, the English judges were divided on the question, whether emission is essential even in sodomy.[4]

§ 1128. **Early English Decisions on Emission.** — Mr. East has collected, and stated at length, the authorities on this question down to the time he wrote; and we need not restate them.[5] His conclusion appears just, that, until Hill's Case was decided, in 1781,

[1] 1 Hale P. C. 628.

[2] Stafford's Case, cited 12 Co. 37.

[3] Case of Buggery, 12 Co. 36, 37. In 3 Inst. 59, Lord Coke states, that penetration is necessary both in sodomy and rape; emission alone not being enough. He makes no mention of emission as essential. Therefore some have inferred that he did not himself yield to the doctrine indicated in the report.

[4] Duffin's Case, 1 East P. C. 437 And see, as to sodomy, post, § 1131.

[5] 1 East P. C. 436–440.

long after the settlement of this country, the current of authority was clear against its necessity.[1]

Common Law of our States. — This being so, the common law of these States must, on general principles, be understood to be the same; while the later English cases cannot bind us.

Later English Decisions. — In Hill's Case, decided, we have seen, in 1781, the majority of the English judges held emission to be indispensable, "on the ground, that carnal knowledge (which they considered could not exist without emission) was necessary to the consummation of the offence. The others denied that definition; and also observed, that carnal knowledge was not necessary to be laid in the indictment, but only that the defendant ravished the party."[2]

The Proof. — According to all opinions, penetration is *prima facie* proof of emission;[3] but the cases in which the question of emission has arisen, have developed circumstances rebutting this presumption.

§ 1129. **Stat. 9 Geo. 4.** — In 1828, legislation interfered in England, providing by 9 Geo. 4, c. 31, § 18, that, "whereas, upon trials for the crimes of buggery and rape, and of carnally abusing girls, &c., offenders frequently escape by reason of the difficulty of the proof which has been required of the completion of those several crimes," "it shall not be necessary, in any of those cases, to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."[4]

How construed. — It was once doubted, whether the effect of this statute was not to make penetration simply *prima facie* evidence;[5] but the construction was afterward settled, that it renders emissions unnecessary to the constitution of the offence.[6]

[1] So, in the Scotch case of Robertson, 1 Swinton, 93, 104, stated post, § 1130, Lord Moncreiff said: "When we look at the English law, there is no doubt that there was a period when a majority of the judges gave a contrary decision [that is, decided emission to be necessary]; some of the ablest men that ever sat on the bench dissenting. But when we look back to Coke and Hale, we see that the old law of England was different. And the new act restores it to what it was in their times."

[2] Hill's Case, 1 East P. C. 439; s. p. Rex *v.* Burrows, Russ. & Ry. 519.

[3] 1 East P. C. 440.

[4] 1 Russ. Crimes, 3d Eng. ed. 682. The present statute, however, is 24 & 25 Vict. c. 100, § 63, but to the same effect.

[5] That it did not, see Rex *v.* Russell, 1 Moody & R. 122.

[6] Rex *v.* Cox, 1 Moody, 337, 5 Car. & P. 297; Brook's Case, 2 Lewin, 267; Reg. *v.* Allen, 9 Car. & P. 31; Rex *v.* Jennings, 4 Car. & P. 249, 1 Lewin, 93; Rex *v.* Cozins, 6 Car. & P. 351.

§ 1130. **Scotch Law as to Emission.** — This question arising in Scotland, the judges, with great force of reasoning, held unanimously that penetration alone is enough. Said Lord Mackenzie: "What is the essence of the crime? Dishonor by violence — not the danger of impregnation, as to which no question is ever asked. Is a woman dishonored or not, by a forcible entry of her person? This has never been doubted in any country of Europe." And further on he adds: "I cannot see why there must be emission, if impregnation is not necessary. It adds nothing to the wickedness, — or to the injury."[1]

Impregnation. — That the danger of offspring did not enter into the old idea of this crime appears in the exploded notion,[2] that impregnation shows such consent by the woman as prevents the intercourse from being rape.[3]

§ 1131. **American Doctrine as to Emission.** — We have seen, that, in principle, emission should be deemed unnecessary in our States: because such was the law of England when, as colonies, the older ones were settled.[4] But we have not many decisions on the question. One case leaves it doubtful;[5] one holds emission unnecessary in sodomy;[6] while another decides, that it is unnecessary in rape.[7] In North Carolina, emission was adjudged to be essential in the offence of carnally abusing a girl under the age of ten years;[8] but a statute promptly corrected the error, and made this ingredient unimportant.[9] The Ohio court, on little or no consideration of the question, held emission to be necessary,[10] and afterward affirmed the doctrine on the ground of *stare decisis;* but intimated, that, if the question were new, the decision would be the other way.[11]

§ 1132. **Penetration.** — Penetration, the authorities agree, is necessary. Even emission, without it, is not enough.[12] In the Scotch case, above referred to, Lord Meadowbank said: "I am of opinion, that, to constitute the crime of rape, it is sufficient

[1] Robertson's Case, 1 Swinton, 93.

[2] 1 Hawk. P. C. Curw. ed. p. 122, § 8.

[3] And see the reasoning in Pennsylvania *v.* Sullivan, Addison, 143.

[4] Ante, § 1128.

[5] The State *v.* Le Blanc, 1 Tread. 354.

[6] Commonwealth *v.* Thomas, 1 Va. Cas. 307.

[7] Pennsylvania *v.* Sullivan, Addison, 143.

[8] The State *v.* Gray, 8 Jones, N. C 170.

[9] The State *v.* Hargrave, 65 N. C. 466.

[10] Williams *v.* The State, 14 Ohio, 222.

[11] Blackburn *v.* The State, 22 Ohio State, 102; Noble *v.* The State, 22 Ohio State, 541.

[12] 3 Inst. 60; 1 Hale P. C. 628; Audley's Case, 3 Howell St. Tr. 401, 403; Fitzpatrick's Case, 3 Howell St. Tr. 419.

that there be *full* penetration; for in grown women it is necessary that the penetration be *full* — otherwise it is *conatus*."[1] But the English and American courts hold, that nothing more than *res in re*, without regard to extent, is required.[2] Even, according to the doctrine now settled in England, the fact of the hymen not being ruptured is only presumptive evidence against penetration; which may be sufficient without.[3]

VII. *Carnal Abuse of Children.*

§ 1133. **Old English Statutes.** — There are English statutes, the early ones — as 18 Eliz. c. 7, § 4, already cited[4] — being probably common law in this country,[5] making the carnal knowledge of female children under ten years, though consenting, felony;[6] and, by the older statute of Westm. 1 (3 Edw. 1), c. 13, also given in a previous section,[7] such carnal knowledge is an indictable misdemeanor where the consenting girl is "within age," which is twelve years.[8] Thus, —

Common-law Doctrine in our States. — Though we have almost no direct decisions to guide us, yet, according to established principles, the common law of this country makes the unlawful carnal knowledge of a girl who consents, while between ten and twelve years old, indictable as misdemeanor: below ten, indictable probably as felony; if not, then indictable as misdemeanor.

Statutes in our States. — The whole subject has been regulated by legislation in many, perhaps all, of the States.[9] It is discussed in "Statutory Crimes."[10]

[1] Robertson's Case, 1 Swinton, 93.

[2] 3 Inst. 59; The State *v.* Le Blanc, 1 Tread. 354; Reg. *v.* Lines, 1 Car. & K. 393; The State *v.* Hargrave, 65 N. C. 466; Stat. Crimes, § 494.

[3] Reg. *v.* Hughes, 2 Moody, 190, 9 Car. & P. 752 (overruling Rex *v.* Gammon, 5 Car. & P. 321); Rex *v.* Russen, 1 East P. C. 438; Reg. *v.* Jordan, 9 Car. & P. 118; Reg. *v.* McRue, 8 Car. & P. 641.

[4] Ante, § 1112.

[5] And see The State *v.* Dick, 2 Murph. 388; Stephen *v.* The State, 11 Ga. 225.

[6] 1 Hale P. C. 630; 1 Russ. Crimes, 3d Eng. ed. 693; Reg. *v.* Day, 9 Car. & P. 722.

[7] Ante, § 1109.

[8] 1 Hale P. C. 626, 631; 1 East P. C. 460. And see Reg. *v.* Lines, 1 Car. & K. 393; People *v.* McDonald, 9 Mich. 150.

[9] See Commonwealth *v.* Bennet, 2 Va. Cas. 235; Commonwealth *v.* Fields, 4 Leigh, 648; Dennis *v.* The State, 5 Pike, 230. See Vol. I. § 37, note; post, § 1136.

[10] Stat. Crimes, § 480, 483–494.

VIII. *Remaining and Connected Questions.*

§ 1134. **Felony or Misdemeanor.**—We have seen,[1] that anciently in England rape was felony, then misdemeanor. Finally, it was made again felony by Westm. 2, c. 34; and this statute became common law in the colonies.[2] Therefore it is felony under the unwritten law of our States. In Missouri, it is, or was, misdemeanor; it was so even when, during slavery, it was committed by a slave, — punished, in the slave, by castration.[3]

§ 1135. **Persons assisting.** — Where rape is felony, and *a fortiori* where it is misdemeanor, if there are persons present abetting the direct perpetrator, they are principals with him in guilt.[4] Consequently, —

Boy — Woman — Husband. — A boy under the age of puberty, or a woman, or a husband in respect of his own wife, may become guilty as principal in the second degree of this offence of rape.[5]

§ 1136. **Attempts.** — An attempt to commit a rape is a common-law misdemeanor, on principles explained in the preceding volume.[6] The offender's intent must be specific, to proceed to violence if necessary,[7] or otherwise do what will be rape in law.[8] He must have attained the age of puberty, or be deemed in law physically capable.[9] How far he must proceed in the execution of his intent was somewhat considered in the preceding

[1] Ante, § 1108 et seq.

[2] 1 Hale P. C. 627; 3 Inst. 60; 1 East P. C. 435; Mears *v.* Commonwealth, 2 Grant, Pa. 385. As to North Carolina, see The State *v.* Dick, 2 Murph. 388.

[3] Nathan *v.* The State, 8 Misso. 631. In North Carolina, the attempt by a slave on a white woman was punished capitally. Sydney *v.* The State, 3 Humph. 478. See, as to Arkansas, Dennis *v.* The State, 5 Pike, 230.

[4] Vol. I. § 607 et seq.

[5] 1 East P. C. 446; 1 Hawk. P. C. Curw. ed. p. 123, § 10; Audley's Case, 3 Howell St. Tr. 401; Reg. *v.* Crisham, Car. & M. 187; Rex *v.* Folkes, 1 Moody, 354; Rex *v.* Gray, 7 Car. & P. 164.

[6] Vol. I. § 723 et seq.

[7] Vol. I. § 729, 733; Rex *v.* Lloyd, 7 Car. & P. 318; Commonwealth *v.* Fields, 4 Leigh, 648; Pefferling *v.* The State, 40 Texas, 486; Reg. *v.* Dungey, 4 Fost. & F. 99, 102; Outlaw *v.* The State, 35 Texas, 481; Commonwealth *v.* Merrill, 14 Gray, 415; Joice *v.* The State, 53 Ga. 50; Taylor *v.* The State, 50 Ga. 79; Carter *v.* The State, 35 Ga. 263. And see Alexander *v.* Blodgett, 44 Vt. 476.

[8] For example, if one simply gets into bed with a woman intending to have carnal connection with her while asleep and unconscious, this is an attempt to commit rape; because the having of the connection in these circumstances would be rape. Reg. *v.* Mayers, 12 Cox C. C. 311, 4 Eng. Rep. 559. Ante, § 1122.

[9] Vol. I. § 373, 746. See Charles *v.* The State, 6 Eng. 389.

volume.[1] A plain case occurs where the law requires emission to constitute the offence; then, if there is penetration and no emission, it is an assault with intent to commit rape.[2] In New York, one decoying a girl under ten, and standing before her indecently exposed, was held to be guilty of assault with intent to commit rape.[3]

[1] Vol. I. § 733, 762. And see Kelly *v.* Commonwealth, 1 Grant, Pa. 484.

[2] Blackburn *v.* The State, 22 Ohio State, 102.

[3] Hays *v.* People, 1 Hill, N. Y. 351, opinion by Cowen, J. And see People *v.* McDonald, 9 Mich. 150. Some difficulties occur, on questions of this sort, where a girl so young consents. See Stat. Crimes, § 491–493.

CHAPTER XXXVII.

RECEIVING STOLEN GOODS.[1]

§ 1137. **How anciently.** — The receiver of stolen goods was anciently guilty of only a misprision or a compounding of felony; but afterward, under an old English statute, he became an accessory after the fact to the thief.[2]

Modern Legislation. — Later legislation, in England and in our States, has made this offence a substantive one.[3]

Embezzled — False Pretences. — Some of the statutes embrace in their terms, not only stolen goods, but goods embezzled,[4] obtained by false pretences,[5] and the like.[6]

§ 1138. *The Intent:* —

Know the Goods stolen. — The person receiving the stolen goods must, as the statutes declare, know them to have been stolen.[7] The knowledge of the theft need not be such as one acquires who witnesses it; but, in the words of Bramwell, B., "it is sufficient if the circumstances were such, accompanying the transaction, as to make the prisoner believe" the goods had been stolen.[8]

Personal Gain. — It is not required, to complete the offence,

[1] For matter relating to this title, see Vol. I. § 567, 694, 699, 785, 789, 974, 975. For the pleading, practice, and evidence, see Crim. Proced. II. § 980 et seq. And see Stat. Crimes, § 345, 378, note.

[2] Vol. I. § 699.

[3] Turner *v.* The State, 40 Ala. 21; The State *v.* Minton, Phillips, 196; Shriedley *v.* The State, 23 Ohio State, 130; Bieber *v.* The State, 45 Ga. 569; People *v.* Shepardson, 48 Cal. 189; Sellers *v.* The State, 49 Ala. 357; Barber *v.* The State, 34 Ala. 213.

[4] Post, § 1141; People *v.* Stein, 1 Parker C. C. 202.

[5] Reg. *v.* Goldsmith, Law Rep. 2 C. C. 74, 12 Cox C. C. 479; Reg. *v.* Wilson, 2 Moody, 52.

[6] And see Reg. *v.* Silversides, 3 Q. B. 406; Hadley *v.* Perks, Law Rep. 1 Q. B. 444.

[7] Huggins *v.* The State, 41 Ala. 393; Rex *v.* Densley, 6 Car. & P. 399; People *v.* Levison, 16 Cal. 98; Copperman *v.* People, 56 N. Y. 591; Andrews *v.* People, 60 Ill. 354.

[8] Reg. *v.* White, 1 Fost. & F. 665. And see Reg. *v.* Wood, 1 Fost. & F. 497; Reg. *v.* Adams, 1 Fost. & F. 86.

that the receiver should act from motives of personal gain: if his object is to aid the thief, this is enough.[1] Nor is it material whether or not a consideration passes between the thief and receiver.[2] Still the intent must be, in some way, fraudulent or corrupt.[3] But —

Reward from Owner. — It is enough if the object is to get from the owner a reward for restoring the goods to him.[4]

§ 1139. *The Act of Receiving:* —

Under Control of Receiver. — The leading doctrine here is, that the goods must come under the control of the receiver; yet the control need not be manual.[5] For instance, —

Hands of one under Command. — If they are in the hands of a person whom he can command in respect of them, they may be deemed to have been received.[6] And where one allowed a trunk of stolen goods to be sent on board a vessel in which he had taken passage, he was held to have received them.[7] But, —

Personal Possession. — If the alleged receiver has no control over the person in whose custody the goods are, they must, to complete the offence, pass into his personal possession.[8] And, —

Receiving. — Besides possession, there must be something which may be deemed a receiving of the goods.[9]

§ 1140. *The Property as having been Stolen:* —

Must have been stolen. — It is merely a truism, that there can

[1] Rex *v.* Davis, 6 Car. & P. 177; Rex *v.* Richardson, 6 Car. & P. 335; Commonwealth *v.* Bean, 117 Mass. 141; The State *v.* Rushing, 69 N. C. 29.

[2] Hopkins *v.* People, 12 Wend. 76.

[3] People *v.* Johnson, 1 Parker C. C. 564; Rice *v.* The State, 3 Heisk. 215; People *v.* Avila, 43 Cal. 196; Gandolpho *v.* The State, 53 Ind. 439; The State *v.* St. Clair, 17 Iowa, 149; Reg. *v.* Pascoe, 4 New Sess. Cas. 66, 2 Car. & K. 927.

[4] People *v.* Wiley, 3 Hill, N. Y. 194. As to receiving, in Michigan, see People *v.* Reynolds, 2 Mich. 422.

[5] Huggins *v.* The State, 41 Ala. 393; Reg. *v.* Miller, 6 Cox C. C. 353.

[6] Reg. *v.* Smith, Dears. 494, 6 Cox C. C. 554, 33 Eng. L. & Eq. 531, 24 Law J. N. S. M. C. 135, 1 Jur. N. S. 575, where it appears that even they need not have passed out of the hands of the thief, provided the receiver controls them in his hands.

[7] The State *v.* Scovel, 1 Mill, 274. And see Reg. *v.* Wiley, 2 Den. C. C. 37, 1 Eng. L. & Eq. 567.

[8] Reg. *v.* Hill, 3 New Sess. Cas. 648, 1 Den. C. C. 453, Temp. & M. 150, 13 Jur. 545, 18 Law J. N. S. M. C. 199.

[9] Jones *v.* The State, 14 Ind. 346. And see Faunce *v.* People, 51 Ill. 311; Reg. *v.* Woodward, Leigh & C. 122, 8 Cox C. C. 95; The State *v.* St. Clair, 17 Iowa, 149; Upton *v.* The State, 5 Iowa, 465.

be no receiving of stolen goods which have not been stolen.[1] For example, —

Principal of Second Degree. — If the person accused is an aider at the fact[2] of the original larceny, — in other words, a principal of the second degree, — he cannot be holden as a receiver.[3] And, —

Remain stolen. — To render this offence of receiving possible, the goods must retain their character of stolen at the time of the receiving. Thus, —

After Possession by Owner. — If the goods have been recovered by the owner, then have passed back to the thief otherwise than by a fresh larceny, they are not now in the hands of the latter as stolen. So that a receiving of them from him who was the original thief does not, however wickedly meant, constitute the offence of receiving stolen goods.[4] Again, —

Received from Thief, not from Receiver. — In like manner, if the goods have been transferred from the thief to a guilty receiver, it is but a truism, that the latter is a receiver, not a thief. In his hands, therefore, and as to him, the goods are not stolen. Their character, in his hands, is derived from his offence, not the offence of the wrong-doer who had them before him. So that one who receives them from him, however wickedly, is not guilty of receiving stolen goods.[5] This doctrine should not be misunderstood; for there may be various receivings from intermediate innocent agents and the like, which are not, within this rule, receivings from the receiver, but rather from the thief.[6]

[1] Reg. *v.* Debruiel, 11 Cox C. C. 207; The State *v.* Taylor, 25 Iowa, 273; Commonwealth *v.* White, 123 Mass. 430; Reg. *v.* Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397; Hey *v.* Commonwealth, 32 Grat. 946.

[2] See Vol. I. § 648–654.

[3] Reg. *v.* Gruncell, 9 Car. & P. 365; Reg. *v.* Smith, Dears. 494, 33 Eng. L. & Eq. 531; Reg. *v.* Perkins, 2 Den. C. C. 459, 5 Cox C. C. 554; The State *v.* Smith, 37 Misso. 58; Reg. *v.* Coggins, 12 Cox C. C. 517, 6 Eng. Rep. 342. See Conner *v.* The State, 25 Ga. 515. See also Reg. *v.* Kelly, 2 Car. & K. 379. As to receiving goods from a slave, in Virginia, see Smith *v.* Commonwealth, 10 Leigh, 695.

[4] Reg. *v.* Dolan, Dears. 436, 1 Jour. N. s. 72, 29 Eng. L. & Eq. 533, overruling Reg. *v.* Lyons, Car. & M. 217; Reg. *v.* Hancock, 14 Cox C. C. 119. And see Reg. *v.* Schmidt, Law Rep. 1 C. C. 15; United States *v.* De Bare, 6 Bis. 358.

[5] The State *v.* Ives, 13 Ire. 338; United States *v.* De Bare, 6 Bis. 358, 362. And see Cassells *v.* The State, 4 Yerg. 149; Wright *v.* The State, 5 Yerg. 154; Reg *v.* Dring, Dears. & B. 329; Reg. *v.* Reardon, Law Rep. 1 C. C. 31, 10 Cox C. C. 241.

[6] Commonwealth *v.* White, 123 Mass. 430; Rex *v.* Missingham, 1 Moody, 257. **Possible Exceptions and Qualifications.** — It is impossible that a work like this should contain nothing which may not be contrary to some statute in some State. And there may be States under whose statutes a receiver from a receiver would be indictable as a receiver also. There are

Thief's Consent. — A taking from the thief without his consent is not within this statute,[1] but is an original larceny.[2]

Original Larceny Statutory. — Though the thing stolen was not the subject of larceny at the common law, if it was made such by a statute, still the receiving of it is a receiving of stolen goods.[3]

§ 1141. *Embezzled Goods:* —

Embezzlement a Separate Offence. — If, as under statutory forms existing in some States, embezzlement is an offence distinct from larceny, and the statute of receiving has merely the words "stolen goods," plainly, in principle, the receiving of embezzled goods is not within the latter prohibition.[4] But —

Embezzlement as Larceny. — We have seen,[5] that, by the terms of most of the statutes against embezzlement, the offender "shall be deemed to have feloniously stolen" the thing embezzled. If, therefore, one guiltily receives the embezzled goods, he is within statutes against receiving "stolen" goods.[6] Again, —

Robbery and Burglary. — Goods taken by robbery and burglary are stolen goods; so, in reason, these statutes apply to them.[7]

§ 1142. *Husband and Wife:* —

Joint receiving. — It is possible for husband and wife to be guilty of a joint receiving; but they will not be, under all circumstances in which they would be jointly liable if single.[8] One case even apparently holds, that married persons cannot jointly commit this offence; but, if it does, it may be deemed to be over-

States in which a receiver is a statutory accessory after the fact. Commonwealth *v.* Finn, 108 Mass. 466, 468; Minor *v.* The State, 58 Ga. 551. Compare with Vol. I. § 699, 700. He is nowhere such at common law. Now, at common law, there can be an accessory before the fact to an accessory before, and an accessory after to an accessory before. Vol. I. § 677, 698. But whether there can be an accessory after to an accessory after I should not, on my present examinations, like to say. If there can, it does not necessarily follow, yet possibly under some forms of the statute it may, that a receiver from a receiver is, by the statute, like the receiver from the thief, an accessory after. And there may be other interesting questions on this subject, under particular statutes.

[1] Reg. *v.* Wade, 1 Car. & K. 739.

[2] Ante, § 781.

[3] Reg. *v.* Deane, 10 U. C. Q. B. 464; post, § 1141, note.

[4] Ante, § 1137, 1140.

[5] Ante, § 327.

[6] Reg. *v.* Frampton, Dears. & B. 585; ante, § 327. In England, later legislation (24 & 25 Vict. c. 96, § 91) has expressly placed goods embezzled and otherwise feloniously obtained on the same ground with stolen goods in respect of this offence. See, as to this, Reg. *v.* Smith, Law Rep. 1 C. C. 266. As said in the last section, the statutes against receiving include statutory larcenies. And see Reg. *v.* Craddock, 2 Den. C. C. 31; ante, § 761; Stat. Crimes, § 139, 140.

[7] And see People *v.* Shepardson, 48 Cal. 189; Shriedley *v.* The State, 23 Ohio State, 130; Reg. *v.* Wardroper, Bell C. C. 249, 8 Cox C. C. 284.

[8] Reg. *v.* Wardroper, Bell C. C. 249, 8 Cox C. C. 284.

ruled.[1] And it is lacking in some of the elements [2] which would render it a complete authority for this proposition.[3] According to general principles, as explained in the first volume,[4] proof of a mere joint receiving, and no more, would be inadequate to convict the wife, while still it would justify a conviction of the husband. But if the evidence went further and showed affirmatively, that the wife, being the more active one, was in no way influenced by the husband, plainly, in principle, she might be convicted jointly with him. Moreover, since a wife may commit larceny separately from her husband, he may guiltily receive the stolen goods from her.[5] But she cannot commit the offence of a receiver by receiving from him.[6] So it has been adjudged; at least, the facts must be very strong to make her guilty.

Receiving from Wife. — Since a wife cannot commit larceny of her husband's goods,[7] a third person cannot become a guilty receiver from her;[8] though, as we have seen,[9] in some circumstances his act will amount to a larceny by him.

§ 1142 *a*. *Larcenies abroad:* —

Not within the Statutes. — The statutes of receiving do not extend to larcenies committed abroad,[10] except where their terms are express to this effect.[11] But —

Subsequent Theft at Home. — Where, by statute or by the judicial rulings on the common law, it is a domestic larceny to bring into the State with felonious intent goods stolen abroad,[12] then, after they have been thus stolen also at home, they are within the general provisions against receiving.[13]

[1] By the case last cited.

[2] See Bishop First Book, § 393.

[3] Reg. *v.* Matthews, 1 Den. C. C. 596; s. c. nom. Reg. *v.* Mathews, 1 Eng. L. & Eq. 549.

[4] Vol. I. § 359, 362, 363.

[5] Reg. *v.* McAthey, Leigh & C. 250; Reg. *v.* Dring, Dears. & B. 329; Reg. *v.* Woodward, Leigh & C. 122, 9 Cox C. C. 95.

[6] Reg. *v.* Brooks, Dears. 184, 14 Eng. L. & Eq. 580; Reg. *v.* Wardroper, Bell C. C. 249, 8 Cox C. C. 284.

[7] Ante, § 872.

[8] Reg. *v.* Kenny, 2 Q. B. D. 307, 13 Cox C. C. 397.

[9] Ante, § 873, 874.

[10] Reg. *v.* Debruiel, 11 Cox C. C. 207.

[11] People *v.* Goldberg, 39 Mich. 545.

[12] Vol. I. § 137–142.

[13] Commonwealth *v.* Andrews, 2 Mass 14; Commonwealth *v.* White, 123 Mass 430.

For RELIGIOUS WORSHIP, see DISTURBING MEETINGS.
RESCUE, see PRISON BREACH, &c.
RESISTING OFFICER, see OBSTRUCTING JUSTICE AND GOVERNMENT

CHAPTER XXXVIII.

RIOT.[1]

§ 1143. Introduction.
1144–1146. The Persons committing the Act.
1147–1151. The Nature of the Act.
1152. The Intent.
1153–1155. Remaining and Connected Questions.

§ 1143. **How defined.** — A riot is such disorderly conduct, in three or more persons assembled and actually accomplishing an object, as is calculated to terrify others.[2]

[1] For matter relating to this title, see Vol. I. § 422, 534, 537, 540, 632, 658, 795. See this volume, AFFRAY; ROUT; UNLAWFUL ASSEMBLY. For the pleading, practice, and evidence, see Crim. Proced. II. § 992 et seq. And see Stat. Crimes, § 539–542.

[2] Blackstone's definition is in Vol. I. § 534. Other definitions are: —

Hawkins. — "A riot seems to be a tumultuous disturbance of the peace, by three persons or more, assembling together of their own authority, with an intent mutually to assist one another against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful." 1 Hawk. P. C. Curw. ed. p. 513, § 1. And see The State *v.* Cole, 2 McCord, 117, 119; The State *v.* Connolly, 3 Rich. 337.

Lord Coke. — Riot "in the common law signifieth when three or more do any unlawful act, as to beat any man, or to hurt him in his park, chase, or warren, or to enter or take possession of another man's land, or to cut or destroy his corn, grass, or other profit, &c." 3 Inst. 176.

Russell — speaking of riots, routs, and unlawful assemblies, says: "The distinction between these offences appears to be, that a *riot* is a tumultuous meeting of persons upon some purpose which they *actually execute* with violence; a *rout* is a similar meeting upon a purpose which, if executed, would make them rioters, and which they actually make *a motion to execute;* and an *unlawful assembly* is a *mere assembly* of persons upon a purpose which, if executed, would make them rioters, but which they *do not execute, nor make any motion to execute.*" 1 Russ. Crimes, 3d Eng. ed. 266. He adopts, however, Hawkins's definition of riot, deeming it substantially correct.

By Statute in Indiana. — "If three or more persons shall actually do an unlawful act of violence, either with or without a common cause or quarrel, or even do a lawful act in a violent and tumultuous manner, they shall be deemed guilty of a riot." The State *v.* Scaggs, 6 Blackf. 37; Bankus *v.* The State, 4 Ind. 114. In the latter case, the defendants had been parties to what was called a "charivari," or mock serenade, and it was held that they were rightly convicted of riot. Perkins, J., observed: "A great noise in the night-time, made by the human voice, or by blowing a trumpet, is a nuisance to those near whom it is made The making of such a noise

How the Chapter divided. — We shall consider, I. The Persons committing the Act; II. The Nature of the Act; III. The Intent; IV. Remaining and Connected Questions.

I. *The Persons committing the Act.*

§ 1144. **How Many.** — A riot requires the concurrence of three or more persons.[1] If two perform any act, however tumultuous, their offence is not riot.[2] By statutes in Illinois[3] and Georgia,[4] however, two are sufficient. And during slavery, two free white men and a negro slave might, under common-law rules, jointly become guilty of riot.[5]

§ 1145. **Wife.** — Though the wife of a conspirator cannot be counted as one of the needful two in conspiring,[6] it does not exactly follow that she may not be one of the required three in riot. The question does not appear to be decided.

§ 1146. **Inactive Persons encouraging Active Ones.** — Perhaps there are cases in which what is done by one of three persons is enough to make him partaker of their guilt,[7] while yet his activity is not such as to constitute him one of the necessary three in a riot; so that, if there had been three active ones, the four would all be rioters in law, while, for the want of the fourth, all escape. A doctrine like this, where two of the three were inactive, seems to

therefore, in the vicinity of inhabitants, is an unlawful act; and, if made by three or more persons in concert, is, by the statute of 1843, a riot." p. 116. See also Sloan *v.* The State, 9 Ind. 565; Hardebeck *v.* The State, 10 Ind. 459.

By Statute in Illinois. — Similar to Indiana. Dougherty *v.* People, 4 Scam. 179. "In our criminal code, a riot is defined to be the doing of an unlawful act by two or more persons with force or violence against the person or property of another, with or without a common cause of quarrel, or even do a lawful act in a violent and tumultuous manner." R. S. c. 30, § 117. Breese, J., in Bell *v.* Mallory, 61 Ill. 167, 168.

By Statute in Georgia. — Similar to Illinois. It is where "two or more persons, either with or without a common cause of quarrel, do an unlawful act of violence, or any other act in a violent and tumultuous manner." Rachels *v.* The State, 51 Ga. 374; Davenport *v.* The State, 38 Ga. 184; Reed Ga. Crim. Law, 341.

[1] See post, § 1146; Commonwealth *v.* Gibney, 2 Allen, 150.

[2] Vol. I. § 534; Turpin *v.* The State, 4 Blackf. 72; Reg. *v.* Ellis, Holt, 636; The State *v.* Allison, 3 Yerg. 428; Rex *v.* Scott, 3 Bur. 1262; Rex *v.* Sudbury, 12 Mod. 262; Commonwealth *v.* Edwards, 1 Ashm. 46.

[3] Dougherty *v.* People, 4 Scam. 179; Bell *v.* Mallory, 61 Ill. 167.

[4] Rachels *v.* The State, 51 Ga. 374.

[5] The State *v.* Jackson, 1 Speers, 13; The State *v.* Thackam, 1 Bay, 358; The State *v.* Calder, 2 McCord, 462.

[6] Ante, § 187.

[7] Post, § 1153.

have been maintained.[1] But, in Maine, the court decided, that, if two persons do the physical mischief while a third is present abetting them, the offence may amount to a riot.[2]

II. *The Nature of the Act.*

§ 1147. **Apprehension of Danger.** — The leading doctrine under this sub-title is, that the act must be calculated to create apprehension of danger in the minds of persons other than the rioters. Therefore, —

Beating One. — Where three or more innocently assemble, and some of them fall upon one of the company, doing no more than simply this, what they do is not a riot.[3]

"Terror of People." — Whether the indictment should allege that the thing done was to the terror of the people, is a question not for this volume.[4] But the Massachusetts court held, that, if it charges an assembling "with force and arms," and acts of violence committed by the rioters, the further allegation of terror is unnecessary. And Parker, J., spoke approvingly of Lord Holt's "distinction founded in good sense:" namely, "that, in indictments for that species of riots which consist in going about armed, &c., without committing any act, the words aforesaid are necessary; because the offence consists in terrifying the public; but, in those riots in which an unlawful act is *committed*, the words are useless."[5] But this proposition only gives force to the general doctrine, that the gist of the offence is the terror created in persons pursuing their lawful callings.

Private Enterprise. — It is said, in some of the books, that the enterprise of the rioters must be of a private nature, in distinction from a public;[6] but this doctrine cannot be maintained. For example, —

[1] Scott *v.* United States, Morris, 142. And see Hardebeck *v.* The State, 10 Ind. 459.

[2] The State *v.* Straw, 33 Maine, 554.

[3] Reg. *v.* Soley, 2 Salk. 594, 595; Anonymous, 6 Mod. 43. See, under the Georgia statute, Rachels *v.* The State, 51 Ga. 374. And see Newby *v.* Territory, 1 Oregon, 163; The State *v.* Kempf, 26 Misso. 429.

[4] Crim. Proced. II. § 997.

[5] Commonwealth *v.* Runnels, 10 Mass. 518, 520, referring to Reg. *v.* Soley, 11 Mod. 117. And see Rex *v.* Hughes, 4 Car. & P. 373; Rex *v.* Cox 4 Car. & P. 538.

[6] The State *v.* Brooks 1 Hill, S. C. 361; The State *v.* Cole, 2 McCord, 117. Hawkins says: "It seems agreed, that the injury or grievance complained of

Opposing Course of Justice. — A riot may be committed in opposing the course of justice of the country.[1]

§ 1148. **How many terrified.** — Not more than one need be terrified. Therefore, in South Carolina, when two white persons and a negro slave went together to where a man was at work; upon their arrival, one of the whites cut a club in the presence of the rest, used threatening language to the man, and commanded his associates to cut up some house-logs the man had prepared, which command they executed, — this was held to be a riot.[2] And where rioters went in a frolic at midnight to a stable, and shaved the horse's tail of the owner, making such noise as aroused and alarmed the family, they were held to be properly convicted; the objection that the injury was confined to only one family being overruled.[3]

§ 1149. **Unlawfulness of Act.** — The act of the rioters need not be such as, if performed by one, would be unlawful. Whether lawful or unlawful, if it is done by three or more in a turbulent

and intended to be revenged or remedied by such an assembly must relate to some private quarrel only; as the enclosing of lands in which the inhabitants of a town claim a right of common, or gaining the possession of tenements the title whereof is in dispute, or such like matters relating to the interests or disputes of particular persons no way concerning the public; for wherever the intention of such an assembly is to redress public grievances, as to pull down all enclosures in general, or to reform religion, or to remove evil counsellors from the king, &c., if they attempt with force to execute such their intentions, they are, in the eye of the law, guilty of levying war against the king, and consequently of high treason." 1 Hawk. P. C. Curw. ed. p. 515, § 6. **Treason -- Riots less than.** — That there can be, in this country, riots of the general sort alluded to in the latter part of this quotation, not amounting to treason, is plain in principle; nor can the proposition as one of American law be overthrown by authority from the English books. Russell, after stating, in his text, this doctrine of Hawkins, adds, in a note: "But see, in 2 Chit. Crim. Law, 494, an indictment said to have been drawn in the year 1797, by a very eminent pleader, for the purpose of suppressing an ancient custom of kicking about footballs on Shrove Tuesday at Kingston-upon-Thames. The first count is for riotously kicking about a football in the town of Kingston; and the second, for a common nuisance in kicking about a football in the said town. And in Sir Anthony Ashley's Case, 1 Rol. 109, Coke, C. J., said that the *stage-players* might be indicted for a riot and unlawful assembly; and see Dalt. Just. c. 136 (citing Rol. R.), that, if such players by their shows occasion an extraordinary and unusual concourse of people to see them act their tricks, this is an unlawful assembly and riot, for which they may be indicted and fined. 19 Vin. Abr. tit. Riots, &c., A. 8." 1 Russ. Crimes, 3d Eng. ed. 267, note.

[1] Pennsylvania *v.* Morrison, Addison, 274. See also Rex *v.* Fursey, 6 Car. & P. 81.

[2] The State *v.* Jackson, 1 Speers, 13.

[3] The State *v.* Alexander, 7 Rich. 5. See also Pennsylvania *v.* Cribs, Addison, 277; The State *v.* Batchelder, 5 N. H. 549. And see Commonwealth *v.* Taylor, 5 Binn. 277; Bankus *v.* The State, 4 Ind. 114; ante, § 1143, note.

manner, calculated to excite terror, it is a riot.[1] An illustration of this doctrine has already been given under the titles Forcible Entry and Detainer, and Forcible Trespass.[2] On the other hand, Hawkins observes: "It is possible for more than three persons to assemble together, with an intention to execute a wrongful act, and also actually to perform their intended enterprise, without being rioters; as if a competent number of people assemble together, in order to carry off a piece of timber to which one of the company hath a pretended right, and afterwards do carry it away without any threatening words, or other circumstances of terror. And from the same ground it seems also to follow, that persons assembled together in a peaceful manner to do a thing prohibited by statute, as to celebrate mass, &c., and afterwards peacefully performing the thing intended, cannot be said to be rioters; for there seems to be no reason why an assembly should become riotous barely for doing a thing contrary to the statute, any more than for doing a thing contrary to common law."[3]

§ 1150. **Object of the Assembling — (Distinguished from Affray — From Unlawful Assembly — Joining with Rioters).** — When persons assemble lawfully, they have not the criminal purpose necessary in riot. And this has led to the idea, expressed or implied in some cases, that the original object of the coming together must be riotous, or in some way criminal.[4] But a combination, lawful in the first instance, can be rendered unlawful by subsequent acts; and then what is done may be a riot.[5] Hawkins states the doctrine thus: "It seems agreed, that, if a number of persons, being met together at a fair or market or churchale or any other

[1] 1 Hawk. P. C. Curw. ed. p. 515, § 7; Kiphart *v.* The State, 42 Ind. 273; The State *v.* Blair, 13 Rich. 93. And see The State *v.* Boies, 34 Maine, 235; The State *v.* York, 70 N. C. 66; Bell *v.* Mallory, 61 Ill. 167; The State *v.* Hughes, 72 N. C. 25; Reg. *v.* Casey, Ir. Rep. 8 C. L. 408; Davenport *v.* The State, 38 Ga. 184; Darst *v.* People, 51 Ill. 286; Samanni *v.* Commonwealth, 16 Grat. 543.

[2] Ante, § 490, 497, 500, 501, 504, 505, 519; Henderson *v.* Commonwealth, 8 Grat. 708; Rex *v.* Stroude, 2 Show. 149; Rex *v.* Wyvill, 7 Mod. 286; Douglass *v.* The State, 6 Yerg. 525.

[3] 1 Hawk. P. C. Curw. ed. p. 515, § 5.

[4] Anonymous, 6 Mod. 43 The State *v.* Stalcup, 1 Ire. 30. In the latter case it was held, that, if an assembly is originally lawful, — as, upon summons, to assist an officer in the execution of lawful process, — subsequent illegal conduct will not make the persons rioters. Said the court: "Such an assembly cannot be considered an unlawful assembly. But, we think, an unlawful assembly is a constituent and necessary part of the offence of a *riot*. It must precede the unlawful act which consummates the offence of riot."

[5] Reg. *v.* Soley, 2 Salk. 594, 595; The State *v.* Cole, 2 McCord, 117; The State *v.* Snow, 18 Maine, 346.

lawful or innocent occasion, happen on a sudden quarrel to fall together by the ears, they are not guilty of a riot, but of a sudden affray only, of which none are guilty but those who actually engage in it: because the design of their meeting was innocent and lawful, and the subsequent breach of the peace happened unexpectedly without any previous intention concerning it. Yet it is said, that, if persons innocently assembled together do afterwards, upon a dispute happening to arise among them, form themselves into parties, with promises of mutual assistance, and then make an affray, they are guilty of a riot; because, upon their confederating together with an intention to break the peace, they may as properly be said to be assembled together for that purpose from the time of such confederacy as if their first coming together had been on such a design: however, it seems clear, that, if in an assembly of persons met together on any lawful occasion whatsoever, a sudden proposal should be started of going together in a body to pull down a house or enclosure, or do any other act of violence, to the disturbance of the public peace, and such motion be agreed to, and executed accordingly, the persons concerned cannot but be rioters; because their associating themselves together for such a new purpose is no way extenuated by their having met at first upon another. Also it seems to be certain, that, if a person seeing others actually engaged in a riot, do join himself unto them, and assist them therein, he is as much a rioter as if he had at first assembled with them for the same purpose; inasmuch as he has no pretence that he came innocently into the company, but appears to have joined himself unto them with an intention to second them in the execution of their unlawful enterprise; and it would be endless as well as superfluous to examine whether every particular person engaged in a riot were in truth one of the first assembly, or actually had a previous knowledge of the design thereof."[1] It is the doctrine of the law, beyond dispute, that a riot is an unlawful assembly carried to the extent of actually doing the thing contemplated;[2] but the result does by no means follow, that there must be a space of time intervening between the existence of the mere unlawful assembly and no more, and its proceeding to perpetrate the ulterior act. If an assembly, however innocent the original purpose

[1] 1 Hawk. P. C. Curw. ed. p. 514, § 3. [2] Post, § 1151. And see the first note to this section.

of the coming together, does riotous things, then all persons present and concurring in the things constitute themselves, by the fact itself, an unlawful assembly; and not the less so because the hand moves simultaneously with the moving of the mind.

§ 1151. **How much must be done — (Distinguished from Unlawful Assembly, continued — From Rout).** — Precisely how much must be done by assembled rioters to complete the offence, is not clear on the authorities. This question relates only to the name of the crime, not to the crime itself. Because, as we shall see under a subsequent title,[1] a mere coming together to commit a riot is indictable as an unlawful assembly; and, as we shall see also,[2] an act performed by the unlawful assembly, makes it a rout. And the name by which the evil conduct is called, is of no consequence, other than as concerns the mere language of the law. The general proposition in riot is, that the thing contemplated must be accomplished.[3]

III. *The Intent.*

§ 1152. **Whether premeditated.** — Russell says: "The violence and tumult must in some degree be premeditated."[4] But this proposition seems to be an inference drawn from authorities not well understood; while, on principle, no reason appears for it. And —

Frolic. — Persons who actually intend only a frolic may, nevertheless, commit a riot.[5]

IV. *Remaining and Connected Questions.*

§ 1153. **Misdemeanor or Felony.** — Riot is misdemeanor, not felony.[6] But there may be circumstances in which a statute has elevated it to the higher degree.[7]

Abetting. — One may become guilty as a rioter, by countenancing those who commit the act, while doing nothing personally.[8] But

[1] Post, UNLAWFUL ASSEMBLY.

[2] Post, ROUT.

[3] Rex *v.* Birt, 5 Car. & P. 154; Reg. *v.* Vincent, 9 Car. & P. 91; ante, § 1143 and notes. Contra, Lord Holt, in Reg. *v.* Soley, 11 Mod. 115. See 1 Russ. Crimes, 3d Eng. ed. 266, note.

[4] 1 Russ. Crimes, 3d Eng. ed. 268.

[5] The State *v.* Alexander, 7 Rich. 5.

[6] Rex *v.* Fursey, 6 Car. & P. 81.

[7] Rex *v.* Fursey, supra. See Rex *v.* Thanet, 1 East P. C. 408.

[8] Vol. I. § 632, 658; Williams *v.* The State, 9 Misso. 268; Rex *v.* Hunt, 1 Keny. 108. And see Treat *v.* Jones, 28 Conn. 334.

where the judge told the jury, that, "in riotous and tumultuous assemblies, all who are present and not actually assisting in the suppression in the first instance are, in presumption of law, participants, and that the obligation is cast upon a person so circumstanced to prove his non-interference," the court of review held this instruction to be erroneous.[1] There must be, if not an active assistance, a readiness to assist,[2] or such counselling as renders one liable according to general principles stated in the preceding volume.[3]

§ 1154. **Conviction for a Minor Offence — Former Jeopardy.** — Some things under these heads have been decided; but we need only refer to the preceding volume,[4] and to the cases.[5]

§ 1155. **Attempts.** — It has been already noted[6] that, out of a particular form of attempted riot, the law has created the separate offence of unlawful assembly; and, when this form of attempt has made a step of further progress, still another name is given it, namely, rout. It seems quite possible there should be other kinds of indictable attempt to commit riot; but the question appears not to have arisen in any of the reported cases.

[1] The State *v.* McBride, 19 Misso. 239. See Vol. I. § 720, 721; Reg. *v.* Atkinson, 11 Cox C. C. 330.

[2] Pennsylvania *v.* Craig, Addison, 190.

[3] Vol. I. § 628 et seq., 646–722; Reg. *v.* Sharpe, 3 Cox C. C. 288.

[4] Vol. I. § 794, and the chapter throughout and the accompanying chapters.

[5] Commonwealth *v.* Kinney, 2 Va. Cas. 139; The State *v.* Townsend, 2 Harring. Del. 543; Shouse *v.* Commonwealth, 5 Barr, 83; Rex *v.* Hemings, 2 Show. 93; Rex *v.* Heaps, 2 Salk. 593; Rex *v.* Hughes, 4 Car. & P. 373; Rex *v.* Cox, 4 Car. & P. 538.

[6] Ante, § 1151.

For RIVER, see WAY.
ROAD, see WAY.

CHAPTER XXXIX.

ROBBERY.[1]

§ 1156, 1157. Introduction.
1158–1165. The Larceny.
1166–1173. The Violence.
1174–1176. The Fear.
1177, 1178. What is deemed the Person.
1179–1182. Remaining and Connected Questions.

§ 1156. **How defined.** — Robbery is larceny committed by violence from the person of one put in fear.[2]

§ 1157. **How the Chapter divided.** — We shall consider, I. The

[1] For matter relating to this title, see Vol. I. § 329, 358, 361, 438, 471, 567, 582, 635, 748, 985, 1055, 1063, 1064. See this volume, ASSAULT; LARCENY; LARCENY COMPOUND. For the pleading, practice, and evidence, see Crim. Proced. II. § 1001 et seq. And see, as to both law and procedure, Stat. Crimes, § 363, 381, 517–530.

[2] And see The State *v.* Gorham, 55 N. H. 152. Some other definitions are the following: —

Lord Coke. — "Robbery is a felony by the common law, committed by a violent assault upon the person of another, by putting him in fear, and taking from his person his money or other goods of any value whatsoever." 3 Inst. 68.

Lord Hale. — "Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling." 1 Hale P. C. 532.

Hawkins. — "Robbery is a felonious and violent taking away from the person of another, goods or money to any value, putting him in fear." 1 Hawk. P. C. Curw. ed. p. 212.

East. — "A felonious taking of money or goods, to any value, from the person of another, or in his presence, against his will, by violence or putting him in fear." 2 East P. C. 707.

Blackstone. — "The felonious and forcible taking, from the person of another, of goods or money to any value, by violence or putting him in fear." 4 Bl. Com. 242.

Lord Mansfield. — "A felonious taking of property from the person of another by force." Rex *v.* Donolly, 2 East P. C. 715, 725.

By Statute in Ohio. — "If any person shall forcibly and by violence, or by putting in fear, take from the person of another any money or personal property of any value whatsoever, with intent to steal or rob, every," &c. Turner *v.* The State, 1 Ohio State, 422.

Other States. — As to Massachusetts, see Commonwealth *v.* Humphries, 7 Mass. 242. As to Georgia, see Long *v.* The State, 12 Ga. 293. As to New Hampshire, see The State *v.* Gorham, supra. As to Kentucky, see Taylor *v.* Commonwealth, 3 Bush, 508; Commonwealth *v.* Tanner, 5 Bush, 316. As to Missouri, see The State *v.* Howerton, 59 Misso. 91. As to Kansas, see The State *v.* Barnett, 3 Kan. 250. And see, as to various States, Stat. Crimes, § 519–530.

Larceny; II. The Violence; III. The Fear; IV. What may be deemed the Person; V. Remaining and Connected Questions.

I. *The Larceny.*

§ 1158. **Robbery is Compound Larceny.** — Robbery, we have seen,[1] is a mere compound larceny. It consists of the same Larceny treated of in a previous chapter, aggravated by what is to be described in those parts of this chapter which follow the present sub-title. Thus, —

§ 1159. **What the Indictment charges.** — The indictment for robbery charges a larceny,[2] together with the aggravating matter which makes it, in the particular instance, robbery. For example, the property is described the same as in an indictment for larceny;[3] the ownership is in the same way set out,[4] and so of the rest. Then, —

Aggravation not proved. — If the aggravating matter is not proved at the trial, the defendant may be convicted of the simple larceny.[5]

§ 1160. **Subjects of Statutory Larceny only.** — It is a principle of interpretation explained in another connection, that whatever is newly created by statute has the same incidents as if it had existed at the common law.[6] Therefore, if a statute makes it larceny to steal a thing not the subject of larceny at the common law, then it becomes, by legal consequence, a robbery to take this thing forcibly from the person of one put in fear. This plain proposition seems never to have been disputed, and on it many cases proceed.[7]

§ 1161. **Asportation.** — Again, in robbery, as in simple larceny, there must be an asportation. Consequently, if the one assaulted merely drops the thing, the other, who is apprehended before he takes it up, does not commit robbery.[8] And, says Lord Hale, "if

[1] Ante, § 892.

[2] Crim. Proced. II. § 1002; Matthews *v.* The State, 4 Ohio State, 539.

[3] Brennon *v.* The State, 25 Ind. 403; McEntee *v.* The State, 24 Wis. 43.

[4] Commonwealth *v.* Clifford, 8 Cush. 215; Smedly *v.* The State, 30 Texas, 214; People *v.* Vice, 21 Cal. 344; Crews *v.* The State, 3 Coldw. 350; Crim. Proced. II. § 1007.

[5] Vol. I. § 1055; The State *v.* Jenkins, 36 Misso. 372.

[6] Stat. Crimes, § 139.

[7] For example, Rex *v.* Cannon, Russ. & Ry. 146; McEntee *v.* The State, 24 Wis. 43; Reg. *v.* Hemmings, 4 Fost. & F. 50; The State *v.* Carro, 26 La. An. 377. And see the form of indictment, 3 Chit. Crim. Law, 807, 808.

[8] Rex *v.* Farrell, 1 Leach, 4th ed. 322,

A have his purse tied to his girdle, and B assaults him to rob him, and in struggling the girdle breaks, and the purse falls to the ground, this is no robbery; because no taking. But if B take up the purse; or, if B had the purse in his hand, and then the girdle break, and striving lets the purse fall to the ground, and never takes it up again; this is a taking and robbery." [1]

§ 1162. **Value.** — Moreover, the thing taken must, as in simple larceny, be valuable, yet need be only of the minutest value; as, where it was a piece of paper, alleged to be worth one penny, robbery was held to be committed.[2]

§ 1162 *a*. **Felonious Intent.** — There must be the same felonious intent as in simple larceny. Thus, —

Mere Battery. — If one commits a mere battery on another, with no intent to steal, this is not robbery.[3] And, —

Compelling Payment. — If a man by violence compels a debtor to pay what he owes, this is not robbery.[4]

§ 1163. **Giving back the Thing.** — After the taking has been effected, the crime is not purged by giving back the thing taken.[5] In like manner, —

Offering Pay. — The offer of money to the injured person, less than the value of the goods, will not make the taking of them less criminal.[6]

§ 1164. **Giving to Robber under Compulsion.** — We considered in the first volume the two cases, of money given by a woman assaulted to preserve her chastity;[7] and, of one writing an order under compulsion.[8] Though the person assaulted delivered with his own hand to the assailant the thing taken, the taking may still be robbery.[9]

§ 1165. **"Personal Property."** — Bank-notes are "personal property," within the robbery statute of Ohio.[10]

note; s. c. nom. Farrel's Case, 2 East P. C. 557; ante, § 797.

[1] 1 Hale P. C. 533, referring to 3 Inst. 69; Dalt. Just. c. 100; Cromp. 35.

[2] Rex *v.* Bingley, 5 Car. & P. 602; ante, § 768.

[3] Murphy *v.* People, 5 Thomp. & C. 302, 3 Hun, 114; The State *v.* Curtis, 71 N. C. 56. And see Jordan *v.* Commonwealth, 25 Grat. 943, 948.

[4] Reg. *v.* Hemmings, 4 Fost. & F. 50. And see People *v.* Vice, 21 Cal. 344; ante, § 849. But it is an offence under an Iowa statute. The State *v.* Hollyway, 41 Iowa, 200.

[5] 1 Hale P. C. 533; Rex *v.* Peat, 1 Leach, 4th ed. 228, 2 East P. C. 557; ante, § 796; Vol. I. § 208 *a*.

[6] Rex *v.* Simons, 2 East P. C. 712; Rex *v.* Spencer, 2 East P. C. 712. And see 1 Hawk. P. C. Curw. ed. p. 215, § 13; ante, § 845.

[7] Vol. I. § 329.

[8] Vol. I. § 748.

[9] 1 Hale P. C. 533.

[10] Turner *v.* The State, 1 Ohio State, 422.

II. *The Violence.*

§ 1166. **Actual or Apprehended.** — There must be, in robbery, either actual violence inflicted on the person robbed; or such demonstrations or threats, and under such circumstances, as to create in him reasonable apprehension of bodily injury.

§ 1167. **Actual Violence — (Snatching).** — According to East, the taking unawares or snatching of a thing from the hand or head of one is not robbery, "unless there be some previous struggle for the possession."[1] But in the later editions of Hawkins, it is said to be robbery "to snatch a basket of linen suddenly from the head of another."[2] The true doctrine is, that the snatching will be robbery, if the article is so attached to the person or clothes as to create resistance, however slight, not otherwise. And where a watch was fastened to a steel chain passing round the owner's neck, one who snatched it away, breaking the chain, was held to be guilty of this offence. "For the prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made, and actual force was used for the purpose."[3] To snatch a pin from a lady's head-dress, so violently as to remove with it a part of the hair from the place where it was fixed,[4] or to force an ear-ring from her ear,[5] is robbery; but not, to snatch property merely from another's hand.[6]

§ 1168. **Taking after Previous Disabling.** — Plainly, if the robber has, in any way, disabled his victim, a simple taking then from the person is sufficient. And, —

Officer Handcuffing. — Where a bailiff handcuffs his prisoner, under pretence of conducting him more safely to prison, but really to rob him; then, if he takes money from the disabled prisoner's pocket, the offence is robbery.[7] So, —

Seizing by Throat. — If one seizes another by the cravat, then forces him against the wall, then abstracts his watch from his

[1] 2 East P. C. 708.

[2] 1 Hawk. P. C. Curw. ed. p. 214, § 9.

[3] Rex *v.* Mason, Russ. & Ry. 419. And see The State *v.* Broderick, 59 Misso. 318; The State *v.* McCune, 5 R. I. 60; The State *v.* John, 5 Jones, N. C. 163.

[4] Rex *v.* Moore, 1 Leach, 4th ed. 335.

[5] Rex *v.* Lapier, 1 Leach, 4th ed. 320, 2 East P. C. 557, 708.

[6] Rex *v.* Baker, 1 Leach, 4th ed. 290, 2 East P. C. 702; Rex *v.* Macauley, 1 Leach, 4th ed. 287; Rex *v.* Robins, 1 Leach, 4th ed. 290, note; Bonsall *v.* The State, 35 Ind. 460; Shinn *v.* The State, 64 Ind. 13. See Mahoney *v.* People, 5 Thomp. & C. 329, 3 Hun, 202. Contra, under the Iowa statute. The State *v.* Carr, 43 Iowa, 418.

[7] Rex *v.* Gascoigne, 1 Leach, 4th ed. 280, 2 East P. C. 709.

pocket even without his knowledge, this graver form of larceny is committed.[1]

§ 1169. **Apprehended Violence.** — It is sufficient, in this offence, that, instead of inflicting actual violence, the wrong-doer creates in his victim a reasonable apprehension of it, and thus secures his object. One adequate method is by assault.[2] And, where money was given to one of a mob in a time of riot, on his coming to the house and begging in a manner which implied menace if it were not given, the getting of it was held to be robbery.[3]

§ 1170. **Apprehension Reasonable.** — The menace must be of a kind to excite reasonable apprehension of danger. Nothing short will do.[4] Moreover, —

Taking while Fear continues. — Though the apparent danger need not be immediate and the taking is not required to be on the instant, the goods must be parted with while the fear continues, and not after time has elapsed, especially in the robber's absence, for it to be removed.[5] And —

Giving under Compelled Oath. — Lord Hale says: "If thieves come to rob A, and, finding little about him, enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath; for the fear continued, though the oath bound him not."[6]

§ 1171. **Apprehended Destruction of the Habitation.** — A real or apparent exception to the general doctrine of this sub-title is seen in some English cases, as follows. Where the threat was by a rioter, to tear down corn and the dwelling-house, the giving under fear of it was deemed to constitute the taker a robber.[7]

[1] Commonwealth *v.* Snelling, 4 Binn. 379. Of a like sort is Mahoney *v.* People, 5 Thomp. & C. 329, 3 Hun, 202. **Drunkenness.** — See, where the taking was from a drunken man, Brennan *v.* The State, 25 Ind. 403.

[2] 1 Hale P. C. 533; 1 Hawk. P. C. Curw. ed. p. 214, § 7. Under some circumstances, the obtaining of money by assault will be robbery, though the assailed person is not put in fear. The State *v.* Gorham, 55 N. H. 152.

[3] Rex *v.* Taplin, 2 East P. C. 712.

[4] Long *v.* The State, 12 Ga. 293; 2 East, P. C. 713; 1 Hawk. P. C. Curw. ed. p. 214, § 8.

[5] Long *v.* The State, 12 Ga. 293; Rex *v.* Jackson, 1 East P. C. Add. xxi., 1 Leach, 4th ed. 193, note, 2 Ib. 618, note; 1 Hawk. P. C. Curw. ed. p. 213, § 1.

[6] 1 Hale P. C. 532. Hawkins appears to be of the opinion, that such an oath, operating on a mistaken man's conscience, is itself a force which makes the transaction robbery. 1 Hawk. P. C. Curw. ed. p. 213, § 1; but Lord Hale's reason — namely, that the fear continues — is a better one, and doubtless where this reason does not apply, the consequence does not follow.

[7] Rex *v.* Simons, 2 East P. C. 781 See Rex *v.* Gnosil, 1 Car. & P. 304.

Even where the danger was not immediate, but it was threatened to bring a mob from a neighboring town then in a state of riot, and burn down the house, and the goods were parted with through fear that this consequence would follow a refusal, but not otherwise from apprehension of personal danger, the crime was held to be committed.[1] The reasons on which these cases proceed are not clear in the reports of them; but East asks, "if the threat of burning down a man's dwelling-house by a mob do not in itself convey a threat of personal danger to the occupiers."[2] However this may be, the dwelling-house is a different thing in the law from mere property. Besides, one without habitation is exposed to the inclement elements; so that to deprive a man of his house is equivalent to inflicting personal injury upon him.

§ 1172. **Charge of Sodomy.** — But the English cases make one real exception to the general doctrine. They hold that, if a man to extort money from another, threatens to bring against him a charge of sodomy, and, through fear of this charge, whether well[3] or ill founded, and the loss of reputation following, the accused person parts with his property, the taking is robbery. There is clearly no foundation of principle for this exception; and, though it is well established in the actual adjudications of the English tribunals, perhaps also of our own,[4] it can only be regarded as an excrescence on the law.

§ 1173. **Other Threats of Prosecution.** — In no other case will a threat of prosecution justify the fear necessary in robbery;[5]

[1] Rex *v.* Astley, 2 East P. C. 729; Rex *v.* Brown, 2 East P. C. 731.

[2] 2 East P. C. 731, note.

[3] Rex *v.* Gardner, 1 Car. & P. 479, Littledale, J., observing: "If he was guilty, the prisoner ought to have prosecuted him for it, and not have extorted money from him."

[4] 1 Hawk. P. C. Curw. ed. p. 215, § 10; Rex *v.* Knewland, 2 Leach, 4th ed. 721, 730; Rex *v.* Jones, 2 East P. C. 714, 715, 1 Leach, 4th ed. 139; Rex *v.* Harrold, 2 East P. C. 715; Rex *v.* Stringer, 2 Moody, 261; Rex *v.* Fuller, Russ. & Ry. 408; Rex *v.* Donnally, 1 Leach, 4th ed. 193; s. c. nom. Rex *v.* Donally, 2 East P. C. 713, 783; Rex *v.* Egerton, Russ. & Ry. 375; Rex *v.* Hickman, 2 East P. C. 728, 1 Leach, 4th ed. 278; Rex *v.* Elmstead, 1 Russ. Crimes, 3d Eng. ed. 894; Long *v.* The State, 12 Ga. 293; People *v.* McDaniels, 1 Parker C. C. 198; Britt *v.* The State, 7 Humph. 45. Some of the above cases go only to the point, that it is robbery to extort money by means of a charge of sodomy, leaving the question open, whether the fear relates to physical consequences of a prosecution, or to the loss of character. Other cases decide, that it need only be of the loss of character.

[5] Britt *v.* The State, 7 Humph. 45; Rex *v.* Newton, Car. Crim. Law, 3d ed. 285; Rex *v.* Knewland, 2 Leach, 4th ed. 721; s. c. Rex *v.* Wood, 2 East P. C. 732; Long *v.* The State, 12 Ga. 293; Reg. *v.* Henry, 2 Moody, 118. Obtaining money from a woman, by a threat to accuse her

because a man in the hands of the law is not legally presumed to be in danger of bodily harm. Still —

Threat as Misdemeanor. — The getting of money from one under the threat to indict him for perjury has been deemed to be a criminal misdemeanor, though not robbery; for, said Lord Holt, "if a man will make use of a process of law to terrify another out of his money, it is such a trespass as an indictment will lie."[1]

III. *The Fear.*

§ 1174. **General Doctrine stated.** — Force and fear are, in this offence, usually connected; therefore, in the last sub-title, we obtained some views pertaining to this. In general terms, the person robbed must be, in legal phrase, put in fear. But, —

Force supplying Place of Fear. — If force is used, there need be no other fear than the law will imply from it; there need be no fear in fact. It is sometimes said, that there must be either force or fear, not necessarily both.[2] The better form of the proposition is, that, where there is no actual force, there must be actual fear; but, where there is actual force, the fear is conclusively inferred by the law.[3] And, within this distinction, an assault, without a battery, is probably to be deemed actual force.[4]

In Absence of Force, Fear in Fact. — Where neither this force is employed, nor any fear is excited, there is no robbery, though there be reasonable grounds for fear.[5] But the exciting of an actual fear, without the employment of force, is adequate.[6]

§ 1175. **Time of the Fear.** — The fear of physical ill must come before the relinquishment of the property to the thief, and not after; else the offence is not robbery.[7]

husband of an indecent assault, is not robbery. Rex *v.* Edwards, 5 Car. & P. 518; s. c. nom. Rex *v.* Edward, 1 Moody & R. 257.

[1] Reg. *v.* Woodward, 11 Mod. 137. And see post, § 1201.

[2] Commonwealth *v.* Snelling, 4 Binn. 379; McDaniel *v.* The State, 8 Sm. & M. 401, 418; The State *v.* Cowan, 7 Ire. 239; Commonwealth *v.* Humphries, 7 Mass. 242; Rex *v.* Frances, 2 Comyns, 478; Long *v.* The State, 12 Ga. 293; McDaniel's Case, 19 Howell St. Tr. 745, 806. And see Seymour *v.* The State, 15 Ind. 288

[3] See also Rex *v.* Reane, 2 Leach, 4th ed. 616.

[4] Vol. I. § 438; The State *v.* Gorham, 55 N. H. 152.

[5] Rex *v.* Reane, 2 East P. C. 734, 2 Leach, 4th ed. 616. And see 2 East P. C. 665, 666.

[6] Commonwealth *v.* Brooks, 1 Duvall, 150; The State *v.* Howerton, 58 Misso 581; Glass *v.* Commonwealth, 6 Bush, 436.

[7] Rex *v.* Harman, 2 East P. C. 736.

§ 1176. **Intent to Prosecute Robber.** — The relinquishment of the property, not through actual fear, but for the purpose of prosecuting the robber, is considered in the first volume.[1]

IV. *What may be deemed the Person.*

§ 1177. **Taking must be from Person.** — Since robbery is an offence as well against the person as the property, the taking must be, in the language of the law, from the person.[2]

What this means. — The meaning of this legal phrase is, not that the taking must necessarily be from the actual contact of the body, but if it is from under the personal protection that will suffice.[3]

§ 1178. **Personal Protection.** — Within this doctrine, the person may be deemed to protect all things belonging to the individual, within a distance, not easily defined, over which the influence of the personal presence extends. "If a thief," says Lord Hale, "come into the presence of A; and, with violence and putting A in fear, drives away his horse, cattle, or sheep;" he commits robbery.[4] The better expression is, that —

Presence. — A taking in the presence of an individual (of course, there being a putting in fear) is to be deemed a taking from his person.[5]

[1] Vol. I. § 438.

[2] Stegar *v.* The State, 39 Ga. 583; Kit *v.* The State, 11 Humph. 167.

[3] And see ante, § 898, 902.

[4] 1 Hale P. C. 533.

[5] Rex *v.* Frances, 2 Comyns, 478; s. c. nom. Rex *v.* Francis, 2 Stra. 1015, Cas. temp. Hardw. 113. In United States *v.* Jones, 3 Wash. C. C. 209, 216, the learned judge employed a form of expression somewhat different, but meaning the same thing. He said: "It is objected, that the taking must be *from the person*. The law is otherwise; for, if it be in the presence of the owner, — as, if by intimidation he is compelled to open his desk, from which his money is taken, or to throw down his purse, which the robber picks up, — it is robbery." Mr. East puts the doctrine thus: "In robbery, it is sufficient if the property be taken in the presence of the owner; it need not be taken immediately from his person, so that there be violence to his person or putting him in fear. As where one, having first assaulted another, takes away his horse standing by him; or, having put him in fear, drives his cattle out of his pasture in his presence, or takes up his purse which the other in his fright had thrown into a bush, or his hat which had fallen from his head." 2 East P. C. 707. "Or," adds Hawkins, "robs my servant of my money before my face." 1 Hawk. P. C. Curw. ed. p. 214, § 5. See also Turner *v.* The State, 1 Ohio State, 422; Rex *v.* Fallows, 5 Car. & P. 508.

V. *Remaining and Connected Questions.*

§ 1179. **Felony.** — Robbery is a common-law felony, "amongst the most heinous felonies."[1] The collateral consequences are such as the first volume discloses. Let us look at some of them here.

§ 1180. **Offenders combining.** — "In some cases," says Hawkins, "a man may be said to rob me, where in truth he never actually had any of my goods in his possession: as, where I am robbed by several of one gang, and one of them only takes my money; in which case, in judgment of law, every one of the company shall be said to take it, in respect of that encouragement which they give to another, through the hopes of mutual assistance in their enterprise; nay, though they miss of the first intended prize, and one of them afterwards ride from the rest, and rob a third person in the same highway without their knowledge, out of their view, and then return to them, — all are guilty of robbery, for they came together with an intent to rob, and to assist one another in so doing."[2] This consequence comes from the doctrine, that all present and assisting; or near enough to assist, if called on, and lending their mental concurrence to the act; are principal offenders, either of the first or second degree.[3] And we have seen,[4] that one thus assenting need be present only during such part of the entire transaction as constitutes a complete offence.[5]

§ 1181. **Attempts.** — An attempt to commit robbery is, the same as other like attempts, indictable as misdemeanor. Having examined the general doctrine of Attempt in the preceding volume, we need here only refer to that discussion[6] and to the authorities, some of which are under statutes, others are pure expositions of the common law.[7]

[1] 3 Inst. 68.

[2] 1 Hawk. P. C. Curw. ed. p. 213, § 4.

[3] Vol. I. § 648–654.

[4] Vol. I. § 649.

[5] As to the subject-matter of this section under the United States statute against robbing the mail, see United States *v.* Mills, 7 Pet. 138.

[6] Vol. I. § 723 et seq.

[7] Rex *v.* Mills, 1 Leach, 4th ed. 259, 1 East P. C. 397; Rex *v.* Lee, 1 Leach, 4th ed. 51; Rex *v.* Mackey, 1 East P. C. 399; Anonymous, 2 East P. C. 662; Reg. *v.* Stringer, 1 Car. & K. 188, 2 Moody, 261; Rex *v.* Thomas, 1 Leach, 4th ed. 330; Rex *v.* Parfait, 1 Leach, 4th ed. 19, 1 East P. C. 416; The State *v.* Bruce, 24 Maine, 71; People *v.* Woody, 48 Cal. 80; Reg. *v.* Walton, Leigh & C. 288, 9 Cox C. C. 268.

§ 1182. **Second Jeopardy.** — For the effect of a previous jeopardy,[1] the reader is referred to the preceding volume.[2]

Robbery in Dwelling-house. — Lord Hale mentions some early English statutes against robbery from the person of one in his dwelling-house;[3] but they can have little practical force here, even if technically they are a part of our common law.

In Highway. — There are statutes in North Carolina and in some of the other States against robbing people "in or near" a highway.[4]

[1] Roberts *v.* The State, 14 Ga. 8; The State *v.* Lewis, 2 Hawks, 98; The State *v.* Brannon, 55 Misso. 63; The State *v.* Pitts, 57 Misso. 85.

[2] Vol. I. § 978 et seq.

[3] 1 Hale P. C. 548; Stat. Crimes, § 525.

[4] The State *v.* Anthony, 7 Ire. 234; Stat. Crimes, § 525, 526.

For ROBBING MAIL, see ante, § 904, note.

CHAPTER XL.

ROUT.[1]

§ 1183. **How defined.** — Rout is an unlawful assembly which has performed some act toward the commission of a riot.[2]

§ 1184. **Related to Riot — to Unlawful Assembly.** — Constituting, therefore, a part of the offence of riot,[3] and being an unlawful assembly to which some step toward a riot is added, the offence of rout is necessarily, in the main, treated of under those two titles. Little need be added here.

§ 1185. **The Act — (Attempting Prize-fight).** — The act which, performed by an unlawful assembly, makes it a rout, may be illustrated by a South Carolina case which holds, that, if the requisite number of persons meet, stake money, and propose to engage in a prize-fight, they commit a rout.[4]

§ 1186. **How Many.** — Not less than three assembled persons are sufficient to commit this offence.[5]

[1] For matter relating to this title, see Vol. I. § 534. See this volume, AFFRAY; RIOT; UNLAWFUL ASSEMBLY. Also, Stat. Crimes, § 539–542, 560. For the pleading, practice, and evidence, see Crim. Proced. II. RIOT.

[2] Hawkins says: "A rout seems to be, according to the general opinion, a disturbance of the peace by persons assembling together with an intention to do a thing which, if it be executed, will make them rioters, and actually making a motion towards the execution thereof. But by some books the notion of a rout is confined to such assemblies only as are occasioned by some grievance common to all the company; as the enclosure of land in which they all claim a right of common, &c." 1 Hawk. P. C. Curw. ed. p. 516, § 8.

[3] Ante, § 1143, note, 1151, 1155.

[4] The State *v.* Sumner, 2 Speers, 599.

[5] Vol. I. § 534; post, § 1257.

For SABBATH-BREAKING, see LORD'S DAY.
SALE OF LIQUOR, see Stat. Crimes.
SCOLD, see COMMON SCOLD, Vol. I. § 1101 et seq.
SCRIPTURES, REVILING, see BLASPHEMY AND PROFANENESS.
SEDUCTION, see Stat. Crimes.

CHAPTER XLI.

SELF-MURDER.[1]

§ 1187. **Whether Offence at Common Law.** — The discussions of the first volume have shown, that self-murder, or suicide, is a common-law felony. But, as no penalty other than the forfeiture of goods, and of personalty generally, which was the common-law punishment,[2] can be inflicted on him who has murdered himself, and as forfeitures for crime are not practised in our States, this offence is not punishable with us.[3] Still it is a question whether or not there are with us collateral offences based on the idea that self-murder is a common-law felony.

Principal of Second Degree. — If, under the common law, as administered in England when this country was settled, one advises another to kill himself, and he does it in the presence of the adviser, the latter becomes guilty of murder, probably as principal of the second degree, but at all events as principal. And it is the same in our States.[4]

Accessory before the Fact. — But as suicide is felony, not misdemeanor, if it is committed in the adviser's absence, the latter, at the common law, goes free of punishment; because the principal, being dead, cannot be first convicted.[5]

Attempt — (Self-Mayhem). — If one attempts to commit self-murder, is he therefore indictable for misdemeanor, the same as though the attempt were on a third person? There would seem to be no ground for distinguishing the common law of England and our States on this head. And by the common law as admin-

[1] For matter relating to this title, see Vol. I. § 259, 510, 615, 652, 968. See this volume, DUELLING; HOMICIDE FELONIOUS.

[2] 1 Hawk. P. C. c. 27, § 7, 8.

[3] See the sections above referred to; also Commonwealth *v.* Bowen, 13 Mass. 356; Reg. *v.* Alison, 8 Car. & P. 418; Rex *v.* Dyson, Russ. & Ry. 523; Rex *v.* Ward, 1 Lev. 8; Hales *v.* Petit, 1 Plow. 253, 260, 261; Rex *v.* Hughes, 5 Car. & P. 126; Rex *v.* Russell, 1 Moody, 356; Reg. *v.* Burgess, Leigh & C. 258.

[4] Vol. I. § 510, 652; Commonwealth *v.* Dennis, 105 Mass. 162.

[5] Vol. I. § 652; Reg. *v.* Leddington, 9 Car. & P. 79.

istered in England, this is an indictable misdemeanor.[1] On the like principle, one is indictable at the common law who inflicts mayhem on himself.[2] But, —

Attempt under Statutes. — Where common-law offences do not prevail, the result under statutes may be different. Thus, in Hawaii, the Penal Code defines and provides a punishment for murder, then declares an attempt to do the act punishable; and the court held, that suicide is not murder under the former provision, therefore an attempt to commit it does not fall within the latter.[3] And in Massachusetts, though there are common-law offences in this State, the court holds, contrary to what would probably be the doctrine in some other States under like statutes,[4] that, because attempts have been fully legislated upon, they have ceased to be cognizable at common law; consequently, and by force of reasoning similar to what prevailed in Hawaii, an attempt to commit suicide is not punishable.[5]

Accidental Killing in Attempted Suicide. — One who, in attempting to take his own life, accidentally kills another who is interfering to prevent it, commits thereby an indictable homicide.[6]

[1] Reg. *v.* Burgess, Leigh & C. 258, 9 Cox C. C. 247; Reg. *v.* Doody, 6 Cox C. C. 463.

[2] Rex *v.* Wright, 1 East P. C. 396, 1 Hale P. C. 412, Co. Lit. 127 *a*.

[3] Rex *v.* Ahsee, 2 Am. Law Rev. 794. See also Reg. *v.* Burgess, Leigh & C. 258, 9 Cox C. C. 247.

[4] Stat. Crimes, § 154–162.

[5] Commonwealth *v.* Dennis, 105 Mass. 162. And see Blackburn *v.* The State, 23 Ohio State, 146, 163.

[6] Commonwealth *v.* Mink, 123 Mass. 422.

For SELLING ADULTERATED MILK, see Stat. Crimes.
SELLING LIQUOR, see Stat. Crimes.

CHAPTER XLII.

SEPULTURE.[1]

§ 1188. **Offences against Right of Burial.** — According to what was set down in the first volume,[2] to sell a dead body for dissection,[3] or otherwise to refuse burial,[4] is indictable at the common law. Also —

Inquest of Coroner. — Preventing a coroner from holding an inquest over a dead body, where an inquest is required by law, as by burying it prematurely, is indictable.[5]

Disinterring. — It is the same of disinterring a buried corpse.[6] In an English case, the defendant had removed, without leave, the bodies of some deceased relatives from a dissenters' burial-place, and he was held to be punishable criminally; though his motive, being to bury them elsewhere, was good.[7]

§ 1189. **Defacing Tomb.** — Lord Coke says: "Concerning the building or erecting of tombs, sepulchres, or monuments for the deceased, in church, chancel, common chapel, or churchyard, in a convenient manner, it is lawful; for it is the last work of charity that can be done for the deceased, who whiles he lived was a lively temple of the Holy Ghost, with a reverend regard and Christian hope of a joyful resurrection. And the defacing of them is punishable by the common law."[8]

[1] For matter relating to this title, see Vol. I. § 468, 506. For the pleading, practice, and evidence, see Crim. Proced. II. § 1009 et seq.

[2] Vol. I. § 506.

[3] Reg. *v.* Feist, Dears. & B. 590, 8 Cox C. C. 18; Vol. I. § 506.

[4] One is not indictable for refusing to bury a relative, if he has not the means to bury him; though he declines to borrow money offered for the purpose. Reg. *v.* Vann, 2 Den. C. C. 325, 5 Cox C. C. 379, 8 Eng. L. & Eq. 596.

[5] Vol. I. § 468.

[6] Vol. I. § 506. And see McNamee *v.* People, 31 Mich. 473.

[7] Reg. *v.* Sharpe, Dears. & B. 160, 7 Cox C. C. 214, 40 Eng. L. & Eq. 581. **Wife's Power over Husband's Body.** — The Pennsylvania court held, that a wife has no control over the body of her deceased husband after its burial; but with the burial her duty to it terminates, and the disposition of it thereafter belongs to the next of kin. Wynkoop *v.* Wynkoop, 6 Wright, Pa. 293.

[8] 3 Inst. 202.

§ 1190. **Statutory Offences.** — There are some statutes relating to these subjects; but a particular discussion of them is not necessary.[1]

[1] Rex *v.* Duffin, Russ. & Ry. 365; Commonwealth *v.* Slack, 19 Pick. 304; Commonwealth *v.* Loring, 8 Pick. 370; The State *v.* McClure, 4 Blackf. 328; Tate *v.* The State, 6 Blackf. 110; Winters *v.* The State, 9 Ind. 172; Commonwealth *v.* Goodrich, 13 Allen, 546; Commonwealth *v.* Viall, 2 Allen, 512; Phillips *v.* The State, 29 Texas, 226; Reg. *v.* Feist, Dears. & B. 590, 8 Cox C. C. 18; Commonwealth *v.* Wellington, 7 Allen, 299. And see Rousseau *v.* Troy, 49 How. Pr. 492. **The General Question.** — On the general question of sepulture, the reader is referred to Mr. Moak's note to In re Bettison, 12 Eng. Rep. 654, embracing a wide collection of authorities.

For SHOP-BREAKING, see BURGLARY.
SHOWS, see PUBLIC SHOWS, Vol. I. § 1145 et seq.
SLANDER, see LIBEL AND SLANDER.

CHAPTER XLIII.

SODOMY.[1]

§ 1191. **How defined.** — Sodomy is a carnal copulation, by human beings, with each other against nature, or with a beast.[2]

Common Law — Statutes. — We have seen,[3] that it is an offence at the common law. It is such also under the common law of Scotland.[4] It is the same in most of our States; but, in Texas, where a statute provides that no person shall be punished for an offence not expressly defined by the law of the State, the majority of the court held the following not to be adequate: "If any person shall commit, with mankind or beast, the abominable and detestable crime against nature, he shall be deemed guilty of sodomy."[5] Consequently sodomy in this State is not punishable.[6] And it is not punishable in Iowa.[7]

§ 1192. **With Fowl.** — Russell says: "An unnatural connection with an animal of the fowl kind is not sodomy, a fowl not coming under the term 'beast;' and it was agreed clearly not to be sodomy when the fowl was so small that its private parts would not admit those of a man, and were torn away in the attempt."[8]

§ 1193. **Consent — Husband and Wife — Men and Boys.** — Unlike rape, sodomy may be committed between two persons, both of whom consent: so it may be between husband and wife:[9] s two men, or a boy and a man, can commit it; and, whichever is the pathic, both may be indicted.[10]

[1] For matter relating to this title, see Vol. I. § 503, 767. And see Stat. Crimes, § 242. For the pleading, practice, and evidence, see Crim. Proced. II. § 1013 et seq.

[2] Vol. I. § 503.

[3] Vol. I. § 503.

[4] Mackenzie Crim. Law, 1, 1, 3; also 1, 15, 4.

[5] Fennell *v.* The State, 32 Texas, 378.

[6] Frazier *v.* The State, 39 Texas, 390. See The State *v.* Campbell, 29 Texas, 44.

[7] Estes *v.* Carter, 10 Iowa, 400.

[8] 1 Russ. Crimes, 3d Eng. ed. 698, referring to Rex *v.* Mulreaty, a manuscript case, by Bayley, J.

[9] Reg. *v.* Jellyman, 8 Car. & P. 604.

[10] Reg. *v.* Allen, 1 Den. C. C. 364, Temp. & M. 55, 2 Car. & K. 869, 13 Jur.

§ 1194. **Penetration — Emission.** — The question of the penetration and emission necessary was discussed under the title Rape.[1] A penetration of the mouth is not sodomy.[2]

§ 1195. **Attempt.** — A solicitation to commit this offence is indictable as an attempt;[3] and there may be other forms of the attempt,[4] — as, assault with the intent.[5]

§ 1196. **Felony or Misdemeanor.** — There is doubt, whether, under the common law of this country, sodomy is felony or misdemeanor, — as to which, see the first volume.[6]

108, 18 Law J. N. S. M. C. 72; 1 East P. C. 480.

[1] Ante, § 1127–1132.

[2] Rex *v.* Jacobs, Russ. & Ry. 331.

[3] Vol. I. § 767; Reg. *v.* Rowed, 6 Jur. 396; Rex *v.* Hickman, 1 Moody, 34.

[4] Reg. *v.* Eaton, 8 Car. & P. 417; Davis *v.* The State, 3 Har. & J. 154.

[5] Reg. *v.* Lock, Law Rep. 2 C. C. 10, 12 Cox C. C. 244. And see Anonymous, 1 B. & Ad. 382; Reg. *v.* Middleditch, 1 Den. C. C. 92.

[6] Vol. I. § 503.

For STOLEN GOODS, see RECEIVING STOLEN GOODS.

CHAPTER XLIV.

SUBORNATION OF PERJURY.[1]

§ 1197. **Is Perjury.** — As already explained,[2] subornation of perjury is, in its essence, but a particular form of perjury itself. Thus, —

How defined. — Hawkins says: "Subornation of perjury, by the common law, seems to be an offence of procuring a man to take a false oath amounting to perjury, who actually takes such oath.[3] But —

Attempt. — "It seemeth clear, that, if the person incited to take such an oath do not actually take it, the person by whom he was so incited is not guilty of subornation of perjury; yet it is certain that he is liable to be punished, not only by fine, but also by infamous corporal punishment."[4] In other words, the unsuccessful incitement is an indictable attempt.[5] There appears to have been a period in our law, when the unsuccessful solicitation was deemed to be subornation of perjury itself; for, as such, it and other indictable attempts corruptly to influence a witness are treated of in some of the old books.[6]

§ 1198. **Procedure.** — There have been some peculiarities of procedure, relating to subornation of perjury; how it is now is shown in "Criminal Procedure."[7] Except for them, there would

[1] For matter relating to this title, see Vol. I. § 468, 974, 975; ante, § 1056. And see Stat. Crimes, § 568. For the pleading, practice, and evidence, see Crim. Proced. § 1019 et seq.

[2] Ante, § 1056; United States *v.* Dennee, 3 Woods, 39.

[3] And see United States *v.* Wilcox, 4 Blatch. 393; Commonwealth *v.* Smith, 11 Allen, 243; Stewart *v.* The State, 22 Ohio State, 477; ante, § 1056.

[4] 1 Hawk. P. C. Curw. ed. p. 435, § 9, 10.

[5] Ante, § 1056; Reg. *v.* Clement, 26 U. C. Q. B. 297; Vol. I. § 468.

[6] As, for example, in Tremaine's Pleas of the Crown, Rex *v.* Margerum, Trem. P. C. 168; Rex *v.* Tasborough, Trem. P. C. 169; and other entries following. Indeed, not one of the entries for subornation of perjury, given in this book, is for the full offence within the modern definitions.

[7] Crim. Proced. II. § 1019 et seq.

seem never to have been any propriety in ranking this as a separate offence.[1]

§ 1199. **Statutes.** — In our several States, there are statutes on this subject; but they do not require consideration here.[2]

[1] Ante, § 1056.

[2] For the statute of Maine and its constructions, see The State *v.* Joaquin, 69 Maine, 218.

For SUICIDE, see SELF-MURDER.
SUNDAY, see LORD'S DAY.
SWEARING, see BLASPHEMY AND PROFANENESS.

CHAPTER XLV.

THREATENING LETTERS AND THE LIKE.[1]

§ 1200. **Early English Statutes.** — Blackstone says: "By the statute 9 Geo. 1, c. 22, amended by statute 27 Geo. 2, c. 15, knowingly to send any *letter*, without a name, or with a fictitious name, *demanding* money, venison, or any other valuable thing, or *threatening* (without any demand) to kill any of the king's subjects, or to fire their houses, out-houses, barns, or ricks, is made felony without benefit of clergy. This offence was formerly high treason by the statute 8 Hen. 5, c. 6."[2]

Later English Statutes. — There have been various later enactings and revisings of statutes on this subject in England; as, 7 & 8 Geo. 4, c. 29, § 8;[3] 7 Will. 4 & 1 Vict. c. 87, § 7;[4] 10 & 11 Vict. c. 66, § 1;[5] and 24 & 25 Vict. c. 96, § 45[6] and 47.[7]

How in our States. — None of the English enactments appear to be common law with us. But, in some of our States, if not all, there are statutes modelled more or less after the English ones.

Interpretations of the Statutes. — The discussions in "Statutory Crimes" will explain, not only the principles on which these statutes are interpreted, but the meanings of their leading terms. In this place, we need only refer to some of the cases.[8]

[1] For matter relating to this title, see Vol. I. § 562, 767; ante, § 407; Stat. Crimes, § 228, 242, 315. For the pleading, practice, and evidence, see Crim. Proced. II. § 1024 et seq.

[2] 4 Bl. Com. 144.

[3] Reg. *v.* Miard, 1 Cox C. C. 22.

[4] Reg. *v.* Taylor, 1 Fost. & F. 511.

[5] Reg. *v.* Jones, 5 Cox C. C. 226.

[6] Reg. *v.* Robertson, Leigh & C. 483, 10 Cox C. C. 9; Reg. *v.* Walton, Leigh & C. 288, 9 Cox C. C. 268.

[7] Reg. *v.* Redman, Law Rep. 1 C. C. 12, 10 Cox C. C. 159.

[8] *American Cases.* — The State *v.* Bruce, 24 Maine, 71; People *v.* Griffin, 2 Barb. 427; Biggs *v.* People, 8 Barb. 547; Robinson *v.* Commonwealth, 101 Mass. 27; Commonwealth *v.* Carpenter, 108 Mass. 15; Commonwealth *v.* Moulton, 108 Mass. 307; Commonwealth *v.* Dorus, 108 Mass. 488; Brabham *v.* The State, 18 Ohio State, 485; The State *v.* Morgan, 3 Heisk. 262; Commonwealth *v.* Murphy, 12 Allen, 449; Shifflet *v.* Commonwealth, 14 Grat. 652; People *v.* Braman, 30 Mich. 460.

English Cases. — Those cited in previ-

Threats other than by Letter. — There may be mischievous threats other than by letter; and to these some of the statutes extend, and some of the cases cited to the last note.

§ 1201. **At Common Law.** — Extortion[1] is a species of common-law threat. And there are threats by persons not officers, indictable at the common law.[2] Statutes have so far covered the ground that the courts have not had occasion to define the limits of the common-law doctrine.

Under National Government. — A threat, and especially a threatening letter, is doubtless in some circumstances an offence against the law of nations. But our United States tribunals have not the jurisdiction to administer this law,[3] without express authority from some act of Congress.[4]

The Intent. — The intent, both under the unwritten law and under the statutes, must be evil. Thus, —

Demanding Money due. — If one demands, by a threat, money which he honestly believes to be due, he does not commit this offence.[5] But, —

Guilty or not. — If the threat is to accuse of crime, and the object is to extort money, it is immaterial whether the person threatened is guilty or not; for in either case there is an attempt to pervert justice.[6]

ous notes to this section; also Reg. *v.* Smith, Temp. & M. 214, 1 Den. C. C. 510, 2 Car. & K. 882, 14 Jur. 92, 19 Law J. N. S. M. C. 80; Rex *v.* McDermod, Jebb, 118; Reg. *v.* Grimwade, 1 Den. C. C. 30, 1 Car. & K. 592; Reg. *v.* Jones, 1 Den. C. C. 218, 2 Car. & K. 398; Rex *v.* Robinson, 2 Leach, 4th ed. 749, 2 East P. C. 1110; Rex *v.* Pickford, 4 Car. & P. 227; Rex *v.* Boucher, 4 Car. & P. 562; Reg. *v.* Wagstaff, Russ. & Ry. 398; Reg. *v.* Hamilton, 1 Car. & K. 212; Rex *v.* Paddle, Russ. & Ry. 484; Rex *v.* Jepson, 2 East P. C. 1115; Rex *v.* Hammond, 2 East P. C. 1119, 1 Leach, 4th ed. 444; Rex *v.* Heming, 2 East P. C. 1116, 1 Leach, 4th ed. 445, note; Reg. *v.* Burridge, 2 Moody & R. 296; Reg. *v.* Coghlan, 4 Fost. & F. 316; Reg. *v.* Richards, 11 Cox C. C. 43; Reg. *v.* Chalmers, 10 Cox C. C. 450; Reg. *v.* McDonnell, 5 Cox C. C. 153; Reg. *v.* Carruthers, 1 Cox C. C. 138; Reg. *v.* Hendy, 4 Cox C. C. 243; Reg. *v.* Redman, Law Rep. 1 C. C. 12; Reg. *v.* Menage, 3 Fost. & F. 310; Skinner *v.* Kitch, Law Rep. 2 Q. B. 393, 10 Cox C. C. 493.

Canada. — Reg. *v.* Johnson, 14 U. C. Q. B. 569.

[1] Ante, § 390 et seq.

[2] Vol. I. § 562, 762.

[3] Vol. I. § 190–203.

[4] See United States *v.* Worrall, 2 Dall. 384.

[5] Reg. *v.* Coghlan, 4 Fost. & F. 316; Reg. *v.* Johnson, 14 U. C. Q. B. 569.

[6] Reg. *v.* Cracknell, 10 Cox C. C. 408; Reg. *v.* Richards, 11 Cox C. C. 43. And see Reg. *v.* Chalmers, 10 Cox C. C. 450.

For TIPPLING-HOUSE, see Vol. I. § 1113–1117; also Stat. Crimes.

CHAPTER XLVI.

TREASON.[1]

§ 1202–1204. Introduction.
1205–1213. The English Treason corresponding to ours.
1214–1236. Treason against the United States.
1254, 1255. Treasons against Individual States.

§ 1202. **Scope of this Chapter.** — In the first volume, are discussed many questions pertaining to the present title. What is said there will not be repeated here. In a manner somewhat fragmentary, we shall here take into review such important questions as remain.

How the American Authorities. — The subject of treason has not been much examined in our American courts; and the little judicial matter we have upon it is principally mere *dicta*. There has been but one treason case before the Supreme Court of the United States, and this was only an application for the discharge of a prisoner on *habeas corpus*. He was discharged, and Marshall, C. J., in giving the opinion of the court, where only the question of discharge was in issue, said many things respecting treason;[2] and afterward sitting, with the district judge by his side, in the trial of Aaron Burr, he explained and commented on this opinion at length.[3] There are a few reports of other trials before the lower courts.[4]

[1] For matter relating to this title, see Vol. I. § 177, 226, 347, 348, 358, 361, 369, 422, 437, 440, 456, 611–613, 639, 655, 659, 681–684, 701–704, 717, 759, 772, 967–977. And see Stat. Crimes, § 136, 139, 227, 568. For the pleading, practice, and evidence, see Crim. Proced. II. § 1030 et seq.

[2] Ex parte Bollman, 4 Cranch, 75.

[3] **The Reports of Burr's Trial.** — Of the Trial of Aaron Burr, there are two original and contemporaneous reports, that of Robertson, published at Philadelphia, in two volumes; and that of Carpenter, published at Washington, in three volumes. More recently there has been published at Washington, in one volume, a report condensed from these two, but principally from the former; edited by J. J. Coombs, Esq., who furnished some notes of his own. Of the two original reports, Robertson's is said to be the more accurate; it is the one to which the references are made in this chapter, except where Coombs's is specified.

[4] See "Two Trials of John Fries," &c., by Carpenter, A. D. 1800; United

§ 1203. **How discussed in this Chapter.** — Trials for treason do not often arise; and, when they do, ample time for preparation is given to counsel. It would not, therefore, be judicious to occupy space in tracing, in any minute way, the current of observation — for it really amounts to little else — found in our American reports of treason trials; since each practitioner can do this for himself as well as an author can for him. Yet it will be useful to call to mind some of the principles on which judicial determination ought, in these cases, to proceed. Gentlemen who manage trials for this high offence are generally from the elevated class of practitioners who, more clearly than men of less acquirements, discern the value of this sort of exposition.

§ 1204. **How the Chapter divided.** — We shall consider, I. The English Treason which corresponds to ours; II. Treason against the United States; III. Treasons against Individual States.

Omitted from this Edition. — In the third, fourth, and fifth editions, there were two other sub-titles; namely, "The Matter as affected by Ordinances of Secession," and "The Matter as affected by Civil War." It is presumed, that, while this edition is a living book on the shelves of dealers, and, it is hoped, for all time, there will be no practical use for these sub-titles. If the discussion is wanted for other purposes, the country contains sufficient copies of it in the old editions to supply all demands. Therefore those sub-titles are omitted from this edition.

I. *The English Treason which corresponds to ours.*

§ 1205. **High and Petit.** — Under the ancient English law, treason was of two kinds, high and petit; but in the United States we have, as already seen,[1] no petit treason. Consequently the only kind of old English treason which concerns us, is high treason.

States *v.* Vigol, 2 Dall. 346; United States *v.* Vilato, 2 Dall. 370; United States *v.* Insurgents of Pa., 2 Dall. 335; United States *v.* Stewart, 2 Dall. 343; United States *v.* Mitchell, 2 Dall. 348; United States *v.* Pryor, 3 Wash. C. C. 234; United States *v.* Hoxie, 1 Paine, 265; Western Insurgents, Whart. St. Tr. 102; Northampton Insurgents, Whart. St. Tr. 458; United States *v.* Hanway, 2 Wal. Jr. 139; United States *v.* Bollman, 1 Cranch C. C. 373; United States *v.* Lee, 2 Cranch C. C. 104; United States *v.* Greathouse, 2 Abb. U. S. 364; also a few things of interest may be found in the later legal and other periodicals. And see Carlisle *v.* United States, 16 Wal. 147; Hanauer *v.* Doane, 12 Wal. 347; Shortridge *v.* Macon, 1 Abb. U. S. 58; Culliton *v.* United States, 5 Ct. of Cl. 627.

[1] Vol. I. § 611, 681, 779.

High Treason anciently. — Hawkins says: "Before the 25 Edw. 3, c. 2, there was great diversity of opinion concerning high treason; and many offences were taken to be included in it besides those expressed in the said statute: as, the killing of the king's father, brother, or even his messenger; producing the pope's bull of excommunication, and pleading it in disability; refusing to accuse a man in the king's courts, and summoning him to appear and defend himself before a foreign prince; and other such like acts tending to diminish the royal dignity of the Crown." [1]

§ 1206. **Stat. 25 Edw. 3.** — Therefore, long before the settlement of this country, high treason (as well as petit) was defined by 25 Edw. 3, stat. 5, c. 2. There were many particulars; but the only part which concerns us declares it to be high treason "if a man do levy war against our lord the king in his realm, or be adherent to the king's enemies in his realm, giving to them aid and comfort in the realm or elsewhere, and thereof be probably attainted of open deed by the people of their condition."

§ 1207. **Later Legislation.** — Later legislation, in England, somewhat extended the crime of treason there, but not greatly. None of it has any relevancy to the subject of our present inquiries.

§ 1208. **Levying War.** — Hawkins says: "Of high treason concerning the levying of war, &c., and adhering to the king's enemies, &c., I shall consider, First, What acts shall be said to amount to a levying of war against the king; Secondly, What shall be said to be an adherence to the king's enemies. As to the first point, it is to be observed, that not only those who directly rebel against the king, and take up arms in order to dethrone him, but also in many other cases those who in a violent and forcible manner withstand his lawful authority, or endeavor to reform his government, are said to levy war against him; and, therefore, those that hold a fort or castle against the king's forces, or keep together armed numbers of men against the king's express command, have been adjudged to levy war against him. But those who join themselves to rebels, &c., for fear of death, and retire as soon as they dare, seem to be no way guilty of this offence.

§ 1209. **Continued.** — "Those also who make an insurrection in order to redress a public grievance, whether it be a real or pre-

[1] 1 Hawk. P. C. Curw. ed. p. 7, § 1.

tended one, and of their own authority attempt with force to redress it, are said to levy war against the king, although they have no direct design against his person, inasmuch as they insolently invade his prerogative, by attempting to do that by private authority which he by public justice ought to do, which manifestly tends to a downright rebellion: as, where great numbers by force attempt to remove certain persons from the king; or to lay violent hands on a privy councillor; or to revenge themselves against a magistrate for executing his office; or to bring down the price of victuals; or to reform the law or religion; or to pull down all bawdy houses; or to remove all enclosures in general, &c. But where a number of men rise to remove a grievance to their private interest, — as to pull down a particular enclosure intrenching upon their common, &c., — they are only rioters.

§ 1210. **Continued.** — "In a special verdict, not only those who are expressly found to have been aiding and assisting a rebellious insurrection, but perhaps also those who are only found to have acted in the execution of the intended violence, or to have attended the principal offender from the beginning, though they be not found to have known the design of the rising, shall be adjudged guilty of high treason. But those who are found only to have suddenly joined with them in the streets, and to have flung up their hats and hallooed with them, are guilty of no greater offence than a riot at most.

§ 1211. **Continued.** — "However it is certain, that a bare conspiracy *to levy such a war* cannot amount to this species of treason, unless it be actually levied. Yet it hath been resolved, that a conspiracy to levy war against the king's person may be alleged as an overt act of *compassing his death*, and that in all cases if the treason be actually completed, the conspirators, &c., are traitors as much as the actors; and that there may be a levying of war where there is no actual fighting.

§ 1212. **Adhering to the King's Enemies.** — "As to the second point, namely, What shall be said to be an adherence to the king's enemies, &c., this is explained by the words subsequent, 'giving aid and comfort to them;' from which it appears, that any assistance given to aliens in open hostility against the king, as by surrendering a castle of the king's to them for reward, or selling them arms, &c., or assisting the king's enemies against his allies, or cruising in a ship with enemies to the intent to destroy the

king's subjects, is clearly within this branch. But there is no necessity expressly to allege, that such adherence was against the king, for it is apparent; yet the special manner of adherence must be set forth. And it is said, that the succoring a rebel fled into another realm is not within the statute, because a 'rebel is not properly an enemy,' and the statute is taken strictly."[1]

§ 1213. **Not well defined.** — It will not compensate us to pursue this subject further in the light of the English text-books and decisions.[2] From the foregoing extracts we see, that, when our country was settled, and afterward when our Constitution was adopted, the English law of treason was not well defined, and especially it was not in all respects drawn according to the dictates of legal principle. Let us, then, see what superstructure was raised in this country on the uncertain foundation of English doctrine.

II. *Treason against the United States.*

§ 1214. **Constitutional Provision.** — By the Constitution, "Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort.[3] No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court. The Congress shall have power to declare the punishment of treason, but no attainder of treason shall work

[1] 1 Hawk. P. C. Curw. ed. p. 11–13, § 23–28.

[2] On that branch of English treason which concerns the levying of war and adhering to the enemy, see Norfolk's Case, 1 Howell St. Tr. 957; Essex's Case, 1 Howell St. Tr. 1333, 1337, 1355; Slingsby's Case, 5 Howell St. Tr. 871; Hewet's Case, 5 Howell St. Tr. 883; Trials of the Regicides, 5 Howell St. Tr. 947, 983; Messenger's Case, 6 Howell St. Tr. 879, 901, note, J. Kel. 70, 75; Freind's Case, 13 Howell St. Tr. 1, 61, note; Vaughan's Case, 13 Howell St. Tr. 485, 530; Gregg's Case, 14 Howell St. Tr. 1371: Dammaree's Case, 15 Howell St. Tr. 521; Purchase's Case, 15 Howell St. Tr. 651, 699; Layer's Case, 16 Howell St. Tr. 93, 312; Hensey's Case, 19 Howell St. Tr. 1341, 1344; Gordon's Case, 21 Howell St. Tr. 485, 499, 644; De la Motte's Case, 21 Howell St. Tr. 687, 808; Watt's Case, 23 Howell St. Tr. 1167, 1191; Hardy's Case, 24 Howell St. Tr. 199; Watson's Case, 32 Howell St. Tr. 1, 431; Brandreth's Case, 32 Howell St. Tr. 755, 865, 889; Frost's Case, 1 Townsend St. Tr. 1, 9 Car. & P. 159; O'Brien's Case, 1 Townsend St. Tr. 469; Story's Case, 3 Dy. 298 *b*; Bensted's Case, Cro. Car. 583; Vaughan's Case, 2 Salk. 634; Axtell's Case, J. Kel. 13; Anonymous, J. Kel. 19; Rex *v.* Tucker, 1 Ld. Raym. 1; Reg. *v.* Davitt, 11 Cox C. C. 676; Reg. *v.* Meaney, Ir. Rep. 1 C. L. 500; s. c. nom. Reg. *v.* Meany, 10 Cox C. C. 506; Reg. *v.* McCafferty, Ir. Rep. 1 C. L. 363, 10 Cox C. C. 603; Reg. *v.* McMahon, 26 U. C. Q. B. 195; Reg. *v.* Lynch, 26 U. C. Q. B. 208; Reg. *v.* School, 26 U. C. Q. B. 212; Reg *v.* Magrath, 26 U. C. Q. B. 385.

[3] And see Vol. I. § 456, 703.

corruption of blood or forfeiture except during the life of the person attainted."[1]

§ 1215. *Statutes:* —

Revised Statutes. — In the Revised Statutes, the terms of the treason enactments are somewhat changed. Whether or not any change in the law itself has thereby been wrought it is not proposed here to inquire. As every reader has by him the Revised Statutes, nothing will be copied from them. But it will be convenient to compare them with the —

Older Enactments. — They are as follows: —

Act of 1790. — It provides: "If any person or persons, owing allegiance to the United States of America, shall levy war against them, or shall adhere to their enemies, giving them aid and comfort within the United States or elsewhere, and shall be thereof convicted, on confession in open court, or on the testimony of two witnesses to the same overt act of the treason whereof he or they shall stand indicted, such person or persons shall be adjudged guilty of treason against the United States, and shall suffer death."[2] By this statute also, misprision of treason is made punishable.[3]

§ 1216. **Act of 1862.** — Thus stood the statutory law until, by act of July 17, 1862, not expressly repealing former acts, the following provisions were added: "Sect. 1. Every person who shall hereafter commit the crime of treason against the United States, and shall be adjudged guilty thereof, shall suffer death, and all his slaves, if any, shall be declared and made free: or, at the discretion of the court, he shall be imprisoned for not less than five years and fined not less than ten thousand dollars, and all his slaves, if any, shall be declared and made free: said fine shall be levied and collected on any or all of the property, real and personal, excluding slaves, of which the said person so convicted was the owner at the time of committing the said crime, any sale or conveyance to the contrary notwithstanding.

§ 1217. **Continued.** — "Sect. 2. If any person shall hereafter incite, set on foot, assist, or engage in any rebellion or insurrection against the authority of the United States, or the laws thereof, or shall give aid or comfort thereto, or shall engage in,

[1] Const. U. S. art. 3, § 3.

[2] Act of April 30, 1790, c. 9, § 1, 1 U. S. Stats. at Large, p. 112.

[3] Vol. I. § 722.

or give aid and comfort to, any such existing rebellion or insurrection, and be convicted thereof, such person shall be punished by imprisonment for a period not exceeding ten years, or by a fine not exceeding ten thousand dollars, and by the liberation of all his slaves, if any he have; or by both of said punishments, at the discretion of the court.

§ 1218. **Continued.** — "Sect. 3. Every person guilty of either of the offences described in this act shall be for ever incapable and disqualified to hold any office under the United States.

§ 1219. **Continued.** — "Sect. 4. This act shall not be construed in any way to affect or alter the prosecution, conviction, or punishment of any person or persons guilty of treason against the United States before the passage of this act, unless such person is convicted under this act."[1]

§ 1220. **Act of July, 1861.** — There were, however, passed the preceding year the following statutes, which it is desirable to consider in this connection: "If two or more persons within any State or Territory of the United States shall conspire together to overthrow, or put down, or to destroy by force, the Government of the United States, or to levy war against the United States, or to oppose by force the authority of the Government of the United States; or by force to prevent, hinder, or delay the execution of any law of the United States; or by force to seize, take, or possess any property of the United States against the will or contrary to the authority of the United States; or by force, or intimidation, or threat to prevent any person from accepting or holding any office, or trust, or place of confidence, under the United States; each and every person so offending shall be guilty of a high crime, and upon conviction thereof in any district or circuit court of the United States, having jurisdiction thereof, shall be punished by a fine not less than five hundred dollars and not more than five thousand dollars; or by imprisonment, with or without hard labor, as the court shall determine, for a period not less than six months nor greater than six years, or by both such fine and imprisonment."[2]

§ 1221. **Act of Aug. 1861.** — "Sect. 1. If any person shall be guilty of the act of recruiting soldiers or sailors in any State or Territory of the United States to engage in armed hostility

[1] Act of July 17, 1862, § 1–4, 12 U. S. Stats. at Large, c. 195, p. 589.

[2] Act of July 31, 1861, 12 U. S. Stats. at Large, c. 33, p. 284.

against the United States, or who shall open a recruiting station for the enlistment of such persons, either as regulars or volunteers, to serve as aforesaid, shall be guilty of a high misdemeanor, and upon conviction in any court of record having jurisdiction of the offence, shall be fined a sum not less than two hundred dollars nor more than one thousand dollars, and confined and imprisoned for a period not less than one year nor more than five years.

§ 1222. **Continued.** — "Sect. 2. The person so enlisted, or engaged as regular or volunteer, shall be fined in a like manner a sum of one hundred dollars, and imprisoned not less than one nor more than three years."[1]

§ 1223. *American Expositions of Doctrine:* —

Following the English Law. — The reader perceives, that the part of the constitutional provision and of the statutes wherein treason is defined, follows in substance the statute of 25 Edw. 3.[2] And it is a general rule in the interpretation of our written laws, that, where a provision employs terms before used in the English law, or even in any other foreign law, such terms are to receive, with us, the foreign meaning. But this rule is not universally binding.[3]

§ 1224. **Following English Expositions.** — In a general way, the rule of adopting the English expositions is applied in the construction of our written law of treason.[4] Still it does not follow, that our courts should adopt every expression of an English judge, or an English text-writer of authority, or even every decision as to the point in controversy, in construing our Constitution and statutes.

[1] Act of Aug. 6, 1861, 12 U. S. Stats. at Large, c. 56, p. 317.

[2] Ante, § 1206.

[3] Stat. Crimes, § 92, 97.

[4] In Burr's Trial, Marshall, C. J., said: "But the term [levying war] is not for the first time applied to treason by the Constitution of the United States. It is a technical term. It is used in a very old statute in that country whose language is our language, and whose laws form the substratum of our laws. It is scarcely conceivable that the term was not employed by the framers of our Constitution in the sense which had been affixed to it by those from whom we borrowed it. So far as the meaning of any terms, particularly terms of art, is completely ascertained, those by whom they are employed must be considered as employing them in that ascertained meaning, unless the contrary be proved by the context. It is, therefore, reasonable to suppose, unless it be incompatible with other expressions of the Constitution, that the term 'levying war' is used in that instrument in the same sense in which it was understood in England, and in this country, to have been used in the statute of the 25th of Edward 3, from which it was borrowed." Burr's Trial, Coombs ed. 308.

§ 1225. **Continued.** — There are even, in the English books, some expressions so variant from the common-sense meaning of the words of the statute as to suggest the doubt, whether, in interpreting similar terms in our Constitution, any regard should be paid to the English expositions. Our Constitution emanated from the whole people. Its provisions were scrutinized and approved by men who knew little and cared nothing of those technical distinctions which the English judges had found it necessary, in some instances, to adopt in order to convict of this grave offence persons obnoxious to the government. The tendency of the English courts has always been to enlarge the boundaries of this offence; and with this the popular mind, being the power from which our Constitution received its sanction, has always been in conflict. Moreover, treason, a political crime, deriving its guilt specially from the intent, is always liable to be expanded by the judicial breath; since the judges are almost of course of opposite political views to the accused person. It is a tendency of the mind, under all circumstances, to attribute corrupt motives to men of opposite opinions, especially political opinions; and treason is a crime of motive, more than any other in the catalogue.

§ 1226. **Attempt to prevent Execution of Statute.** — One very peculiar doctrine, understood to prevail in England,[1] and sanctioned to some extent in this country,[2] is, that any violent attempt to prevent the execution, in all cases, of an act of the legislature, not from private motives, but public, is treason. Now, while we cannot doubt that the violence which accompanies such an attempt may be a sufficient overt act, where the treasonable purpose exists, we shall find the conclusion difficult, that an aim thus circumscribed — an ultimate object so far short of what is generally sought by actual "war" — comes within any proper meaning of the phrase "levying war."

§ 1227. **Continued — ("Levying War" — "Adhering to Enemies").** — This question depends on the meaning of the words "levying war." The words "adhering to their enemies, giving them aid and comfort," merely refer to the doctrine of being an aider at

[1] See Rex *v.* Gordon, 2 Doug. 590; Reg. *v.* Frost, 9 Car. & P. 129; ante, § 1208.

[2] 3 Greenl. Ev. § 242 and note; United States *v.* Hoxie, 1 Paine, 265; United States *v.* Hanway, 2 Wal. Jr. 139; United States *v.* Mitchell, 2 Dall. 348.

the fact of a levying of war, as applicable to treason.[1] Now, without undertaking any nice definition of the word "war," one proposition is maintainable; namely, that —

Meaning of "War." — It is an attempt, by force, either to subjugate or to overthrow the government against which it is levied. Ordinarily, where the overthrow is not contemplated, a treaty acknowledging rights previously denied is expected. This result of a treaty need not be intended in form, while it must be in substance. Therefore, —

Opposing Statute. — If a body of men, under the mistaken notion that a particular statute is in violation of fundamental or constitutional right, should combine to oppose by force its execution everywhere and at all times, and commit the overt act required, they would undoubtedly be guilty of treason, provided their determination was also to resist, by violence, every attempt to bring them to justice, and to continue this course until the government should be compelled to yield to them. But if their intent went no further than to the bare forcible prevention of the execution of the statute, they not meaning to measure power with the government, or to resist any arrest and trial for their conduct, it could not, on any just principle of interpretation, be deemed a "levying of war." Suppose, to show the absurdity of a contrary doctrine, one nation should make a reprisal on another, intending to submit to whatever infliction the nation thus despoiled should itself deem due as punishment: the notion, that the first nation had thereby levied war on the second, would be as absurd as such conduct would itself be ridiculous. If the reprisal were meant, as reprisals are, to extort compensation to which the other government should yield, through fear, without inflicting successful chastisement in return, the case would be different.

§ 1228. **Whether Combination necessary.** — And this leads to a question which is best approached by putting it, — Can one alone,

[1] **Adhering to Rebellion.** — It has been sometimes held, however, that, in a case of rebellion, a person who adheres to the cause of the rebels, giving them aid and comfort, can, as to the mere form of the indictment, be proceeded against only under the former clause for "levying war;" the word "enemies" in the latter clause being construed to mean foreign enemies, and not to include rebel subjects. See the charge of Field, J., and of Hoffman, J., in the Chapman Treason case, pamph., San Francisco, 1863; also, a debate in the United States Senate, July 17, 1862. And see ante, § 1212. But see post, § 1232–1234.

by his own unaided act, without combination, and without a conspiracy of any sort, commit, in point of law, the treason of levying war? The reader will find abundant *dicta* to the effect, that there must be, in this offence, a combination of numbers, accompanied, of course, by a use, actual or threatened, of force.[1] And perhaps some of the *dicta* may approach very near to adjudication, or even be adjudication itself. But if there must be more than one, how many must there be? Are two enough? Are two hundred? That the combination need not be of numbers adequate to overthrow the armies of the government on the field of battle, — so found by the jury as fact, or adjudged by the court as law, — is a plain proposition, lying clear in the entire body of decision and practice on this subject. Must the jury find, that the government actually began to tremble under the coming danger? No. There is no such doctrine.

§ 1229. **What is "Levying War."** — Now, on principle, to constitute a levying of war there must be, in the mind of the guilty persons, an intent either to overthrow the government, or to compel it, through fear, to yield to something to which it would not voluntarily assent.[2] Added to this intent, there must be an array of assembled numbers collected for the purpose of war; or, on the other hand, some act of violence, or some other kind of act, in the nature of war.[3] Yet, —

One alone. — Though it may, it is presumed, be legally possible for one man alone to levy war upon his government, we can hardly imagine circumstances in which the jury would be justified in finding him guilty, where no others were shown to have acted with him.

§ 1230. **Intent — Overt Act.** — Plainly, in this offence, the leading element is the warlike intent. In reason, nothing can be a levying of war, where this full intent does not exist. Yet suppose it does exist, there must still be an act, in compliance, not only with the express words of the written law, but also with the

[1] See Ex parte Bollman, 4 Cranch, 75. And in Burr's Trial, Marshall, C. J., distinguishing the point adjudged from the *dicta* of the court, speaks of the exact point decided in Ex parte Bollman as being, "that no treason could be committed because no treasonable assemblage had taken place." Burr's Trial, Coombs ed. 312. Still, seeing that point was necessarily decided with reference to the facts of the particular case, the decision could not, in the nature of things, control such a case as might be imagined, attended by differing circumstances.

[2] Ante, § 1227.

[3] And see, the authorities referred to, Vol. I. § 132.

doctrine of the unwritten, that a mere evil imagining does not constitute a crime.[1]

§ 1231. **The Overt Act — (Conspiring).** — A mere conspiring, with nothing done beyond, is a sufficient act to satisfy the common-law rule.[2] So likewise it is a sufficient "overt act" under most of the English statutory provisions against treason; as, for example, under those which make it treason or felony to compass the death or deposition of the sovereign.[3] But it is not an overt act of "levying war," consequently it is not sufficient under this clause of our statutes against treason.[4] And —

Assembling. — A mere assemblage, if not of a warlike character, seems to have been deemed to come short of the "overt act" which is required.[5] In other words, —

Overt Act defined. — The "overt act" must be one which, in itself, *pertains to warlike operations*. It must be, in some sense, an act of war; and, in this view, it is to the nature of the act, rather than its magnitude, that inquiry is to be directed.

§ 1232. **Overt Act of adhering to Enemies.** — We have thus far been speaking of "levying war." But when war is levied, the "overt act" of "adhering to the enemies of the country, giving

[1] Vol. I. § 204.

[2] Vol. I. § 432.

[3] Mulcahy *v.* Reg. Law Rep. 3 H. L. 306; Rex *v.* Stone, 6 T. R. 527.

[4] Ante, § 1211; Anonymous, J. Kel. 19, Dalison, 14; Ex parte Bollman, 4 Cranch, 75; Respublica *v.* Carlisle, 1 Dall. 35; United States *v.* Hanway, 2 Wal. Jr. 139; Reg. *v.* Frost, 9 Car. & P. 129.

[5] At the time of the breaking out of the secession war, Sprague, J., in a charge to the grand jury in the district court of the United States at Boston, employed the following language: "It is settled, that, if a body of men be actually assembled for the purpose of effecting a treasonable purpose by force, that is levying war. But it must be an assemblage in force, a military assemblage in a condition to make war. A mere conspiracy to overthrow the government, however atrocious such conspiracy may be, does not of itself amount to the crime of treason. Thus, if a convention, legislature, junto, or other assemblage entertain the purpose of subverting the government, and to that end pass acts, resolves, ordinances, or decrees, even with a view of raising a military force to carry their purpose into effect, this alone does not constitute a levying of war." Charge to the Grand Jury, 23 Law Reporter, 705, 707. In the circuit court for the southern district of New York, Smalley, J., said in a charge to the grand jury: "Persons owing allegiance to the United States have confederated together, and with arms, by force and intimidation, have prevented the execution of the constitutional acts of Congress, have forcibly seized upon and hold a custom-house, and post-office, forts, arsenals, vessels, and other property belonging to the United States, and have actually fired upon vessels bearing the United States flag and carrying United States troops. This is a usurpation of the authority of the federal government; it is high treason by levying war. Either one of these acts will constitute high treason." Charge to the Grand Jury, 23 Law Reporter, 597, 599. See also Ex parte Bollman, 4 Cranch, 75

them aid and comfort," may be a different thing. For, in the language of Marshall, C. J., "if war be actually levied, — that is, if a body of men be actually assembled for the purpose of effecting by force a treasonable purpose, — all those who perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are to be considered as traitors."[1]

§ 1233. **Mere Words of Adhering.** — Still, even in this class of cases, while the opinion has been expressed that words alone are a sufficient act, the better doctrine is, that, unless they are written and used as a writing, they are not. But if so written and used, they are often adequate;[2] as, for instance, where they constitute an intercepted letter to an enemy.[3]

§ 1234. **Adhering defined.** — Said a learned judge: "What amounts to adhering to and giving aid and comfort to our enemies, it is somewhat difficult in all cases to define; but certain it is that furnishing them with arms, or munitions of war, vessels, or other means of transportation, or any materials which will aid the traitors in carrying out their traitorous purposes, with a knowledge that they are intended for such purposes, or inciting and encouraging others to engage in or aid the traitors in any way, does come within the provisions of the act. And it is immaterial whether such acts are induced by sympathy with the rebellion, hostility to the government, or a desire for gain."[4]

§ 1235. **Allegiance.** — Under the act of Congress, of 1790, a person, to be guilty of treason, must owe allegiance to the United States. It is the same also under the Revised Statutes.[5] "Allegiance," says Sprague, J., "is of two kinds; that due from citizens, and that due from aliens resident within the United States. Every sojourner who enjoys our protection is bound to good faith toward our government; and, although an alien, he may be guilty of treason by co-operation either with rebels or foreign enemies.

[1] Ex parte Bollman, 4 Cranch, 75, 126; reaffirmed, Burr's Trial, Coombs ed. 322; Vol. I. § 226.

[2] 3 Inst. 14; 2 Stark. Slander, 166–168; 3 Greenl. Ev. § 240; Foster, 197 et seq.; 1 East P. C. 117 et seq.; Peacham's Case, 3 Howell St. Tr. 368; Challercomb's Case, 3 Howell St. Tr. 368; William's Case, 3 Howell St. Tr. 368; Trials of the Regicides, 5 Howell St. Tr. 947, 983; Frost's Case, 22 Howell St. Tr. 471, 480.

[3] Rex *v.* Jackson, 1 Crawf. & Dix C. C. 149. And see Rex *v.* Stone, 6 T. R. 527; Rex *v.* Hensey, 1 Bur. 642.

[4] Charge of Smalley, J., to the Grand Jury, 23 Law Reporter, 597, 601. See also United States *v.* Pryor, 3 Wash. C. C. 234; Vaughan's Case, 2 Salk. 634.

[5] Ante, § 1215; R. S. of U. S. § 5331.

The allegiance of aliens is local, and terminates when they leave our country. That of citizens is not so limited."[1]

§ 1236. **Questions under Act of 1862.**[2] — Some expositions of this act, especially in its combination with the prior statute of treason, were given in the earlier editions. It is believed, that, since the statutes were revised, those expositions have become unimportant. If the reader finds the fact to be otherwise, he is referred to the fifth edition.

§ 1237–1253. [These sections are omitted for reasons already stated.[3]]

III. *Treason against the Individual States.*

§ 1254. **In General.** — Treason can be committed as well against a State as the United States.[4] But the same act which is treason against the United States is not necessarily treason against the State.[5] By constitutional or statutory provisions in most of the States, the offence, as against the State, is limited substantially as it is by the Constitution and laws of the United States as to the offence against the General Government.

§ 1255. **As to Minuter Doctrines.** — It is believed not best to occupy the space it would require to thread the minuter doctrines of treason against individual States.[6] The question is constantly diminishing in importance, and not likely often to arise.

[1] Charge to the Grand Jury, 23 Law Reporter, 705, 710. See also United States *v.* Villato, 2 Dall. 370; United States *v.* Wiltberger, 5 Wheat. 76, 97. As to treason by an alien, see Reg. *v.* McCafferty, Ir. Rep. 1 C. L. 363, 10 Cox C. C. 603; Ex parte Quarrier, 2 W. Va. 569; Carlisle *v.* United States, 16 Wal. 147; Rex *v.* Tucker, 1 Ld. Raym. 1.

[2] See, for this act, ante, § 1216–1219. And see United States *v.* Greathouse, 2 Abb. U. S. 364.

[3] Ante, § 1204.

[4] Vol. I. § 177, 456.

[5] And see Ex parte Quarrier, 2 W. Va. 569.

[6] See Respublica *v.* Carlisle, 1 Dall. 35; Respublica *v.* Malin, 1 Dall. 33; Hammond *v.* The State, 3 Coldw. 129; Ex parte Quarrier, 2 W. Va. 569.

For TRESPASS, FORCIBLE, see FORCIBLE TRESPASS.

CHAPTER XLVII

UNLAWFUL ASSEMBLY.[1]

§ 1256. **How defined.** — An unlawful assembly is a congregating of three or more persons to do some unlawful act.[2]

§ 1257. **The Act Meant — (Riot).** — It is generally understood that the act intended must be such as, when done, will amount to riot. But —

Other Unlawful Act. — Undoubtedly persons may be indictable for assembling to commit an offence other than riot. Yet whether it is correct in legal language to call their coming together an unlawful assembly, or whether the act is to be regarded as a criminal attempt to do the wrong intended,[3] the books are not clear. The question, being one of mere words, is not important.

§ 1258. **Intent General.** — There need be no specific intent to do a particular mischief. If the assembly is calculated to excite alarm and terror, it is an unlawful assembly.[4]

§ 1259. **Assemblages to defend a Legal Right.** — Hawkins says: "An assembly of a man's friends, for the defence of his person against those who threaten to beat him if he go to such a mar-

[1] For matter relating to this title, see Vol. I. § 534. See this volume, AFFRAY; RIOT; ROUT; and, particularly, ante, § 1143 and note, 1151, 1155. And see Stat. Crimes, § 539–542, 560.

[2] Hawkins. — "An unlawful assembly, according to the common opinion, is a disturbance of the peace by persons barely assembling together with an intention to do a thing which, if it were executed, would make them rioters, but neither actually executing it, nor making a motion towards the execution of it. But this seems to be much too narrow a definition. For any meeting whatsoever, of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly; as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning the most proper means for the recovery of their interests; for no one can foresee what may be the event of such an assembly." 1 Hawk. P. C. Curw. ed. p. 516, § 9. Blackstone's definition is given Vol. I. § 534.

[3] See Vol. I. § 728 et seq.

[4] Rex *v.* Blisset, 1 Mod. 13; Rex *v.* Hunt, 1 Russ. Crimes, 3d Eng. ed. 273, Reg. *v.* Neale, 9 Car. & P. 431; Reg. *v.* Vincent, 9 Car. & P. 91; Rex *v.* Cox, 4 Car. & P. 538; Rex *v.* Birt, 5 Car. & P. 154. See also 1 Russ. Crimes, 3d Eng. ed. 272–274.

ket, &c., is unlawful; for he who is in fear of such insults must provide for his safety by demanding the surety of the peace against the persons by whom he is threatened, and not make use of such violent methods, which cannot but be attended with the danger of raising tumults and disorders, to the disturbance of the public peace. Yet an assembly of a man's friends in his own house, for the defence of the possession thereof against those who threaten to make an unlawful entry thereinto, or for the defence of his person against those who threaten to beat him therein, is indulged by law; for a man's house is looked upon as his castle."[1] We are thus conducted back to the discussions of the first volume concerning the "Defence of Person and Property."[2] What Hawkins here says about an assemblage to defend a man's castle is clearly correct.[3] The other branch of the doctrine of this eminent author doubtless needs some qualification. For plainly there may be circumstances in which a man may receive the assistance of his friends in the defence merely of his person, without exposing them to indictment for an unlawful assembly.

[1] 1 Hawk. P. C. Curw. ed. p. 516, § 10.

[2] Vol. I. § 836 et seq.

[3] Vol. I. § 858, 859, 877.

For UNLICENSED LIQUOR SELLING, see Stat. Crimes.
UNLICENSED LOTTERIES, &c., see Stat. Crimes.

CHAPTER XLVIII.

USURY.[1]

§ 1260. **How in Criminal Law.** — The subject of usury pertains more to the civil department of the law than to the criminal. But, in rare circumstances, and in some of our States, it comes under the animadversion of the criminal courts, therefore a few words relating to it may be important.

How defined — General Doctrine of Usury. — Hawkins says: "It seems that usury, in a strict sense, is a contract upon a loan of money to give the lender a certain profit for the use of it, upon all events, whether the borrower make any advantage of it, or the lender suffer any prejudice for the want of it, or whether it be repaid on the day appointed, or not. And in a larger sense it seemeth, that all undue advantages taken by a lender against a borrower come under the notion of usury, whether there were any contract in relation thereto or not; as where one, in possession of land made over to him for the security of a certain debt, retains his possession after he hath received all that is due from the profits of the land. But —

Penalty. — "It hath been resolved, that an agreement to pay double the sum borrowed, or other penalty, on the non-payment of the principal debt at a certain day, is not usurious; because it is in the power of the borrower wholly to discharge himself by repaying the principal according to the bargain."[2]

§ 1261. **How at Common Law.** — The common law did not make the taking of interest for money indictable, where the rate was not exorbitant; but, where it was, it did.[3] Still the idea prevailed in early times, that, even where the rate was not exorbitant, the taking was contrary to good conscience. And Haw-

[1] For matter relating to this title, see Crim. Proced. I. § 580.

[2] 1 Hawk. P. C. Curw. ed. p. 613, § 1-8. And, to the proposition of the last paragraph, Sumner *v.* People, 29 N. Y. 337, and numerous cases therein cited.

[3] 2 Chit. Crim. Law, 548, note.

kins says, it was formerly supposed that no action would lie to recover such interest; though afterward a contrary doctrine was established.[1]

§ 1262. **Old English Statutes.** — There are, relating to interest and usury, some English statutes early enough in date to be common law in our States;[2] but, —

American Legislation. — In probably all the States, the English enactments have been superseded by State legislation. Under the State laws, not enough has been established, and the subject is not of sufficient general importance, to render a particular discussion of it desirable. The few cases which have arisen, whether on the law or the procedure, are referred to in a note.[3]

§ 1263. **Not in all States indictable.** — Generally, in our States, the taking of unlawful interest is only a civil wrong; and, where it is otherwise, the criminal prosecution is seldom resorted to.

[1] 1 Hawk. P. C. Curw. ed. p. 613, § 4–7.

[2] See 1 Hawk. P. C. Curw. ed. p. 614; Reg. *v.* Dye, 11 Mod. 174; Rex *v.* Hendricks, 2 Stra. 1234; Lancaster's Case, 1 Leon. 208.

[3] Sumner *v.* People, 29 N. Y. 337; Curtis *v.* Knox, 2 Denio, 341; The State *v.* Tappan, 15 N. H. 91; Gillespie *v.* The State, 6 Humph. 164; Young *v.* The Governor, 11 Humph. 147; Livingston *v.* Indianapolis Insurance Company, 6 Blackf. 133; Murphy *v.* The State, 3 Head, 249; Bank of Salina *v.* Henry, 2 Denio, 155; Fielder *v.* Darrin, 50 N. Y. 437; The State *v.* Tappan, 15 N. H. 91; McAuly *v.* The State, 7 Yerg. 526; Wilkins *v.* Malone, 14 Ind. 153; The State *v.* Williams, 4 Ind. 234; Merriman *v.* The State, 6 Blackf. 449; Groves *v.* The State, 6 Blackf. 489; Crawford *v.* The State, 2 Ind. 112.

For VAGRANCY, see Vol. I. § 515, 516, 706.
VERBAL SLANDER, see LIBEL AND SLANDER.
VIOLATION OF SABBATH, see LORD'S DAY.
VOTING, ILLEGAL, see Stat. Crimes.
WAGER, see Stat. Crimes.

CHAPTER XLIX.

WAY.[1]

§ 1264, 1265. Introduction.
1266–1271. Kinds of Ways.
1272–1279. Act of Obstruction.
1280. Condition of Repair.
1281–1283. Person or Corporation responsible for Non-repair.
1284–1287. Remaining and Connected Questions.

§ 1264. **Nuisance.** — The obstruction of a public way is a public nuisance.[2] In this aspect, the present chapter would seem to belong among the others on nuisance in the first volume. But the discussion here will take a wider range.

§ 1265. **How the Chapter divided.** — We shall consider, I. The Kinds of Ways of which the Obstruction and Neglect to Repair are indictable; II. The Act of Obstruction; III. The Condition of Repair in which the Way must be put and kept; IV. The Person or Corporation responsible for Non-repair; V. Remaining and Connected Questions.

I. *The Kinds of Ways of which the Obstruction and Neglect to repair are indictable.*

§ 1266. **Public Ways — (Private).** — The kind of way is seen in the proposition, that the obstruction, as a crime, grows out of the inconvenience suffered by the public. The way, therefore, must be public. Any injury done to a mere private road, over which only individuals have the right to pass, is not a crime.[3]

Meaning of "Highway." — The term highway, in legal phrase, denotes all ways of a public nature, such as rivers, wagon-roads,

[1] For matter relating to this title, see Vol. I. § 173–176, 227, 236, 241–245, 341, 419, 531, 792. See NUISANCE, Vol. I. § 1071 et seq. For the pleading, practice, and evidence, see Crim. Proced. II. § 1042 et seq. See also Stat. Crimes, § 156, note, 164, note, 206, 298, 407, 928.

[2] Vol. I. § 531.

[3] Vol. I. § 243–245, 530, 531.

foot-paths, and the like, over which the public are entitled to travel, whether with or without the payment of toll.[1]

§ 1267. **How Way established.** — There are various methods known to the law by which highways are established, not quite uniform in our States, — such as prescription, dedication to the public by the owner of the soil and the acceptance implied in their use, the laying of them out by public authority, legislative grants, and the like. The discussion of these questions is not fully within the scope of this chapter, yet they often become important. Reference to some cases, therefore, is made in the note.[2]

[1] See Angell & Durfee on Highways, § 2; Commonwealth *v.* Wilkinson, 16 Pick. 175; Cleaves *v.* Jordan, 34 Maine, 9, 12; Vantilburgh *v.* Shann, 4 Zab. 740; The State *v.* Atkinson, 24 Vt. 448; People *v.* Kingman, 24 N. Y. 559; Peckham *v.* Lebanon, 39 Conn. 231, 235; Reg. *v.* Saintiff, Holt, 129; Mills *v.* The State, 20 Ala. 86. **Special Meanings.** — The meaning of the word "highway" is not inflexible. Thus, though it is generally as stated in the text, it has been held in North Carolina that a railroad is not a "highway" as the word is used in the Code providing the death penalty for robbery in or near a highway. The State *v.* Johnson, Phillips, 140. So in Alabama, a navigable river is held not to be a highway within the statute against gaming. "Under the existing laws of the United States and of this State," said Rice, C. J., "the navigable rivers within this State are public highways for certain purposes; but it does not follow that they are so for all purposes." **Defined in Alabama.** — He also observed, that, in Mills *v.* The State, supra, a highway was defined to be "a public road; that is, a road dedicated to, and kept by, the public, as contradistinguished from private ways, or neighborhood roads, which are not so kept up." Glass *v.* The State, 30 Ala. 529. **Pent Roads.** — In Vermont, all "pent roads" are public highways, but their use by the public is subject to the right of adjoining proprietors to erect suitable gates or bars to protect their fields and crops. Wolcott *v.* Whitcomb, 40 Vt. 40. **Not worked.** — In Indiana, it is not necessary, in order to constitute a public road a highway, within the act forbidding the obstructions of highways, that it should be worked. The State *v.* Frazer, 28 Ind. 196.

[2] *Alabama.* — Thompson *v.* The State, 21 Ala. 48; Oliver *v.* Loftin, 4 Ala. 240.

Illinois. — Martin *v.* People, 13 Ill. 341; Daniels *v.* People, 21 Ill. 439; Martin *v.* People, 23 Ill. 395; Conkling *v* Springfield, 39 Ill. 98.

Indiana. — Hays *v.* The State, 8 Ind. 425; The State *v.* Hill, 10 Ind. 219; The State *v.* Huggins, 47 Ind. 586.

Iowa. — Harrow *v.* The State, 1 Greene, Iowa, 439; The State *v.* Snyder, 25 Iowa, 208.

Kentucky. — Commonwealth *v.* Abney, 4 T. B. Monr. 477; Commonwealth *v.* Ditto, Hardin, 450; Gedge *v.* Commonwealth, 9 Bush, 61.

Maine. — The State *v.* Sturdivant, 18 Maine, 66; The State *v.* Beeman, 35 Maine, 242; The State *v.* Strong, 25 Maine, 297; The State *v.* Kittery, 5 Greenl. 254; The State *v.* Madison, 33 Maine, 267; The State *v.* Bigelow, 34 Maine, 243; The State *v.* Wilson, 42 Maine, 9; Hinks *v.* Hinks, 46 Maine, 423; The State *v.* Noyes, 47 Maine, 189.

Massachusetts. — Commonwealth *v.* Weiher, 3 Met. 445; Commonwealth *v.* Belding, 13 Met. 10; Commonwealth *v.* Low, 3 Pick. 408; Commonwealth *v.* Tucker, 2 Pick. 44; Commonwealth *v.* Gowen, 7 Mass. 378; Commonwealth *v.* Fitchburg Railroad, 8 Cush. 240; Com-

Other like Questions. — There are other questions of a like nature, not within our range of inquiry, while yet the reader may have occasion to look at the cases.[1]

Way Legal or not. — In a certain sense, the way must be legal; if it is laid out by officers empowered, the steps required by law must have been taken by them.[2] But there may be defects which cannot be inquired into, or of which a person charged with obstructing it cannot avail himself. These questions depend much upon the varying laws of the States.[3] One is not justified

monwealth *v.* Smyth, 14 Gray, 33; Commonwealth *v.* Taunton, 16 Gray, 228.

Michigan. — People *v.* Beaubien, 2 Doug. Mich. 256.

Minnesota. — Furnell *v.* St. Paul, 20 Minn. 117.

Missouri. — Golahar *v.* Gates, 20 Misso. 236.

New Hampshire. — The State *v.* Gilmanton, 14 N. H. 467; The State *v.* Canterbury, 8 Fost. N. H. 195; The State *v.* Landaff, 2 Fost. N. H. 588; The State *v.* Canterbury, 40 N. H. 307; The State *v.* Northumberland, 44 N. H. 628.

New Jersey. — Perrine *v.* Farr, 2 Zab. 356; Stephens, &c. Co. *v.* Central Railroad, 5 Vroom, 280; The State *v.* Pierson, 8 Vroom, 216.

New York. — People *v.* Lawson, 17 Johns. 277; People *v.* Lambier, 5 Denio, 9; Harrington *v.* People, 6 Barb. 607; Fearing *v.* Irwin, 55 N. Y. 486.

North Carolina. — The State *v.* Spainhour, 2 Dev. & Bat. 547; The State *v.* Cardwell, Busbee, 245; The State *v.* Marble, 4 Ire. 318.

Pennsylvania. — Commonwealth *v.* Cole, 2 Casey, 187; Pennsylvania *v.* Oliphant, Addison, 346; Balliet *v.* Commonwealth, 5 Harris, Pa. 509.

Rhode Island. — The State *v.* Richmond, 1 R. I. 49; The State *v.* Cumberland, 6 R. I. 496; The State *v.* Cumberland, 7 R. I. 75.

South Carolina. — The State *v.* Huffman, 2 Rich. 617; The State *v.* Duncan, 1 McCord, 404; The State *v.* Lythgoe, 6 Rich. 112; The State *v.* Mobley, 1 McMullan, 44; The State *v.* Gregg, 2 Hill, S. C. 387; The State *v.* Sartor, 2 Strob. 30.

Tennessee. — Mankin *v.* The State, 2 Swan, Tenn. 206; Anderson *v.* The State, 10 Humph. 119; Shelby *v.* The State, 10 Humph. 165; Stump *v.* McNairy, 5 Humph. 363; The State *v.* Loudon, 3 Head, 263; Russell *v.* The State, 3 Coldw. 119.

Vermont. — The State *v.* Alburgh, 32 Vt. 262; Blodget *v.* Royalton, 14 Vt. 288; The State *v.* Newfane, 12 Vt. 422; The State *v.* Woodward, 23 Vt. 92.

Virginia. — Holleman *v.* Commonwealth, 2 Va. Cas. 135; Commonwealth *v.* Howard, 1 Grat. 555.

Wisconsin. — Wisconsin River Impr. Co. *v.* Lyons, 30 Wis. 61.

England. — Rex *v.* Leake, 2 Nev. & M. 583, 5 B. & Ad. 469; Reg. *v.* East Mark, 11 Q. B. 877; Rex *v.* Richards, 8 T. R. 634; Rex *v.* Cumberworth, 3 B. & Ad. 108; Rex *v.* Wright, 3 B. & Ad. 681; Reg. *v.* Hornsey, 10 Mod. 150; Reg. *v.* Wilts, 6 Mod. 307, Holt, 339; Reg. *v.* Chorley, 12 Q. B. 515; Roberts *v.* Hunt, 15 Q. B. 17; Rex *v.* Morris, 1 B. & Ad. 441; Reg. *v.* Blakemore, 2 Den. C. C. 410, 5 Cox C. C. 513, 9 Eng. L. & Eq. 541; Gerring *v.* Barfield, 16 C. B. N. S. 597; Reg. *v.* Westmark, 2 Moody & R. 305.

[1] The State *v.* Marble, 4 Ire. 318; Commonwealth *v.* Fisher, 6 Met. 433; Commonwealth *v.* Beeson, 3 Leigh, 821; Reg. *v.* Bamber, 13 Law J. N. S. M. C. 13, 8 Jur. 309; Reg. *v.* Hornsea, Dears. 291; The State *v.* Atkinson, 24 Vt. 448; Elkins *v.* The State, 2 Humph. 543; Commonwealth *v.* Alburger, 1 Whart. 469; Martin *v.* People, 13 Ill. 341.

[2] Rex *v.* Sanderson, 3 U. C. O. S. 103; Martin *v.* People, 13 Ill. 341; Pennsylvania *v.* Oliphant, Addison, 345.

[3] The State *v.* Hill, 10 Ind. 219; Commonwealth *v.* Ditto, Hardin, 450; The

in obstructing a highway because it is less than the statutory width.[1]

§ 1268. **Cul de Sac.** — Can a *cul de sac*, being a way which terminates in no other, and ends on private property, be such a highway that to obstruct it is indictable? By some opinions it cannot, because, it is said, as the public has no occasion to use it, its obstruction is of no public detriment.[2] But, on principle, the public may reserve to itself the use of such a way, as sometimes it does of a square,[3] rendering its obstruction punishable for the same reason.[4] However this may be, —

Public Necessity. — The question of public necessity may often be important in the evidence, as to whether a particular way is public or not.[5]

§ 1269. **Foot-way, Horse-way, &c.** — Besides the ordinary highways, over which vehicles are driven, there are public foot-ways,[6] horse-ways,[7] and the like,[8] the obstruction of which is in the same manner indictable.

Public Square. — So public squares are a sort of public way; and their obstruction is an offence on the like principle.[9]

Bridge. — A bridge is ordinarily a part of the way in which it is laid;[10] but sometimes it is subject to special regulations, not necessary to be here described.[11]

State *v.* Madison, 33 Maine, 267; The State *v.* Bigelow, 34 Maine, 243; Stephens, &c., Co. *v.* Central Railroad, 5 Vroom, 280; Commonwealth *v.* Howard, 1 Grat. 555.

[1] The State *v.* Robinson, 28 Iowa, 514.

[2] See Angell & Durfee on Highways, § 27–31; Commonwealth *v.* Tucker, 2 Pick. 44; The State *v.* Duncan, 1 McCord, 404; The State *v.* Lythgoe, 6 Rich. 112; The State *v.* Randall, 1 Strob. 110; The State *v.* Rye, 35 N. H. 368; Rex *v.* Hammond, 10 Mod. 382.

[3] Post, § 1269.

[4] See Danforth *v.* Durell, 8 Allen, 242; People *v.* Kingman, 24 N. Y. 559; The State *v.* Frazer, 28 Ind. 196; People *v.* Jackson, 7 Mich. 432, 449, 450.

[5] Reg. *v.* Hornsey, 10 Mod. 150; The State *v.* Canterbury, 8 Fost. N. H. 195; The State *v.* Northumberland, 44 N. H. 628.

[6] Thrower's Case, 1 Vent. 208, 3 Salk. 392.

[7] Rex *v.* St. Weonard, 5 Car. & P. 579; Reg. *v.* Saintiff, Holt, 129.

[8] Peckham *v.* Lebanon, 39 Conn. 231, 235.

[9] The State *v.* Atkinson, 24 Vt. 448; Commonwealth *v.* Bowman, 3 Barr, 202; Rung *v.* Shoneberger, 2 Watts, 23; Commissioners *v.* The State, Riley, 146; The State *v.* Commissioners, 3 Hill, S. C. 149; Commonwealth *v.* Rush, 2 Harris, Pa. 186. See Commonwealth *v.* Eckert, 2 Browne, Pa. 249.

[10] The State *v.* Canterbury, 8 Fost. N. H. 195; Reg. *v.* Saintiff, Holt, 129; Rex *v.* Middlesex, 3 B. & Ad. 201; Rex *v.* Bucks, 12 East, 192.

[11] Attorney-General *v.* Hudson River Railroad, 1 Stock. 526; Commonwealth *v.* Newburyport Bridge, 9 Pick. 142; Rex *v.* Derby, 3 B. & Ad. 147; Rex *v.* Wilts, 6 Mod. 307; Follett *v.* People, 17 Barb. 193; People *v.* Thompson, 21 Wend. 235, 23 Wend. 537; Commonwealth *v.* New Bedford Bridge, 2 Gray, 339; Reg. *v.*

Ferry. — The like observations apply to ferries;[1] which, however, are oftener than bridges owned and managed separately from the carriage-ways they connect.

§ 1270. **Turnpike Roads — Railroads — Plank Roads.** — Turnpike-roads,[2] railroads,[3] and plank roads,[4] owned by corporations established for the purpose, are highways, concerning which the same observations may be made as concerning other highways.

Railroads. — The doctrines must necessarily be modified somewhat, when applied to railroads; because they are not open to the public in the same manner as other highways; the corporation furnishing the vehicles and motive power.[5]

Turnpike Roads — (Obstruction — Non-repair). — An obstruction of a turnpike road is indictable the same as of any other public way.[6] And in general an indictment will lie against the corporation, and sometimes also against individual members,[7] for the non-repair of it.[8] Indeed, this double liability is recognized in many circumstances,[9] — a question depending much on the differing terms of statutes. Whether the town, county, or other like body or person, who is not the owner of the turnpike road, is also indictable, the same as for the non-repair of other public ways in the locality, depends on the terms of the charter. The mere fact,

Kitchener, Law Rep. 2 C. C. 88, 12 Cox C. C. 522; Brown *v.* Preston, 38 Conn. 219; Saugatuck Bridge Co. *v.* Westport, 39 Conn. 337; Clinton Bridge, 10 Wal. 454; The State *v.* Lake, 8 Nev. 276; Rex *v.* Derbyshire, 2 Q. B. 745, 2 Gale & D. 97, 6 Jur. 483; The State *v.* Morris Canal and Banking Co., 2 Zab. 537; Meadville *v.* The Erie Canal, 6 Harris, Pa. 66; The State *v.* Dearborn, 15 Maine, 402. See The Binghampton Bridge, 3 Wal. 51; The State *v.* Whitingham, 7 Vt. 390.

[1] Payne *v.* Partridge, 1 Show. 255. And see, as to ferries, The State *v.* Hudson, 3 Zab. 206; People *v.* Babcock, 11 Wend. 586; Carter *v.* Commonwealth, 2 Va. Cas. 354; Stark *v.* McGowen, 1 Nott & McC. 387; Sparks *v.* White, 7 Humph. 86; Broom, Leg. Max. 2d ed. 559; Hudson *v.* The State, 4 Zab. 718; Parrott *v.* Lawrence, 2 Dillon, 332; Police Jury *v.* Shreveport, 5 La. An. 661, 663; Marks *v.* Donaldson, 24 La. An. 242; The State *v.* Wilson, 42 Maine, 9; Angell & Durfee on Highways, § 46 et seq.

[2] Commonwealth *v.* Wilkinson, 16 Pick. 175; Rex *v.* Netherthong, 2 B. & Ald. 179; Waterford and Whitehall Turnpike *v.* People, 9 Barb. 161; Reg. *v.* Preston, 2 Lewin, 193.

[3] Angell & Durfee on Highways, § 17–23; Rex *v.* Pease, 4 B. & Ad. 30.

[4] Craig *v.* People, 47 Ill. 487.

[5] Angell & Durfee on Highways, § 18; ante, § 1266, note.

[6] Commonwealth *v.* Wilkinson, 16 Pick. 175.

[7] Vol. I. § 424.

[8] Red River Turnpike *v.* The State, 1 Sneed, 474. See The State *v.* Day, 3 Vt. 138. And see the last note to this section.

[9] See Vol. I. § 422; Kane *v.* People, 8 Wend. 203; Canaan *v.* Greenwoods Turnpike, 1 Conn. 1; The State *v.* Patton, 4 Ire. 16. See also Reg. *v.* Sheffield Canal, 4 New Sess. Cas. 25, 14 Jur. 170, 19 Law J. N. S. M. C. 44; The State *v.* Morris Canal and Banking Co., 2 Zab. 537; Meadville *v.* The Erie Canal, 6 Harris, Pa. 66; post, § 1282.

that, by the charter, the corporation is required to keep the road in repair, does not, at least according to some opinions, exonerate from the duty any other body who would, on other principles, be under the obligation. But perhaps this conclusion is derived from the particular words of the statutes on which the question has arisen.[1] On the other hand, the Virginia tribunal took the extreme view, that, where the act of incorporation subjects to a penalty an individual intrusted with the repairing of the road, for the breach of his duty, even the corporation itself is not liable to indictment for non-repair,[2] — a conclusion hardly harmonious with doctrines held elsewhere.[3]

§ 1271. **Rivers.** — Navigable rivers are public highways, subject to the same rules, as far as applicable, as the travelled carriage-ways of the country.[4]

Harbors, &c. — The same may be said of harbors and other like waters.[5]

II. *The Act of Obstruction.*

§ 1272. **In General Terms.** — Any act performed under circumstances showing a criminal intent, whereby any one of the ways enumerated in the foregoing sections, or any other public highway, is in a perceptible manner[6] obstructed, or rendered less commodious, is indictable as a nuisance.[7]

[1] Reg. *v.* Preston, 2 Lewin, 193; Rex *v.* Netherthong, 2 B. & Ald. 179; Rex *v.* Mellor, 1 B. & Ad. 32.

[2] Commonwealth *v.* Swift Run Gap Turnpike, 2 Va. Cas. 361.

[3] Simpson *v.* The State, 10 Yerg. 525; Waterford and Whitehall Turnpike *v.* People, 9 Barb. 161. And see The State *v.* Thompson, 2 Strob. 12.

[4] Ang. & D. Highways, § 53–75; Chase *v.* American Steamboat Co., 10 R. I. 79; Thompson *v.* Androscoggin River Impr. Co., 54 N. H. 545; The State *v.* Thompson, 2 Strob. 12; Rex *v.* Stanton, 2 Show. 30; Bailey *v.* Philadelphia, &c., Railroad, 4 Harring. Del. 389; People *v.* St. Louis, 5 Gilman, 351; Moore *v.* Sanborne, 2 Mich. 519; Reg. *v.* Betts, 16 Q. B. 1022, 22 Eng. L. & Eq. 240; Stuart *v.* Clark, 2 Swan, Tenn. 9; Newark Plank Road *v.* Elmer, 1 Stock. 754; Rex *v.* Trafford, 1 B. & Ad. 874. And see Rex *v.* Grosvenor, 2 Stark. 511; Gunter *v.* Geary, 1 Cal. 462; Rex *v.* Clueworth, Holt, 339; Atlee *v.* Packet Co., 21 Wal. 389; Thunder Bay Co. *v.* Speechly, 31 Mich. 336; Wisconsin River Impr. Co. *v.* Lyons, 30 Wis. 61; Cox *v.* The State, 3 Blackf. 193. What is a navigable river, see Stat. Crimes, § 303.

[5] Rex *v.* Tindall, 1 Nev. & P. 719, 6 A. & E. 143; Commonwealth *v.* Alger, 7 Cush. 53; Rex *v.* Ward, 4 A. & E. 384; People *v.* Horton, 5 Hun, 516.

[6] **Slight Obstruction.** — The words, "a perceptible," &c., are used because no better occur to me. There seems to be a doctrine, that the obstruction may be too slight for the law's notice; Vol. I. § 227; but the limit of this proposition cannot be clearly defined. See also Reg. *v.* Russel, 3 Ellis & B. 942, 26 Eng. L. & Eq. 230, 23 Law J. N. S. M. C. 173, 18 Jur. 1022.

[7] Vol. I. § 531; The State *v.* Merrit, 35 Conn. 314; People *v.* Horton, 5 Hun,

Counterbalancing Benefit. — It was laid down in one or two cases, that, for an obstruction to be indictable, it must not carry with it a counterbalancing benefit to the public.[1] But this doctrine is not sound in principle; and, in point of authority, it is overruled, and the contrary is established.[2] Yet, consistently with the established doctrine, another is held, not perhaps well defined, but something like this: that, if what is done is in pursuance of a general right, and, on the whole, the way is rendered not less advantageous for public use, — as, where the owner of the soil carries into a stream or tide-water a wharf for the benefit of navigation, — it is not indictable; while, if the erection is for some other purpose, and for the private benefit of the riparian owner, it is indictable.[3] Consequently, —

Opening another Way. — It does not justify an obstruction that the party opened another way through which travel might pass.[4] But, —

Conflicting Rights. — Where there are conflicting rights of way, the one must yield to the other according to the dictates of good sense; as, where a wire cable was laid across a river as a guy on which to run a ferry boat, it was deemed not unlawful, unless actually hazardous to the navigation of the river.[5]

516; San Francisco *v.* Clark, 1 Cal. 386. And see Beach *v.* People, 11 Mich. 106; Reg. *v.* United Kingdom Electric Telegraph, 9 Cox C. C. 137; Commonwealth *v.* Taunton, 16 Gray, 228.

[1] Rex *v.* Russell, 6 B. & C. 566; Pilcher *v.* Hart, 1 Humph. 524, 533.

[2] Vol. I. § 341; Rex *v.* Ward, 4 A. & E. 384; Respublica *v.* Caldwell, 1 Dall. 150; People *v.* Horton, supra; Reg. *v.* Betts, 16 Q. B. 1022, 22 Eng. L. & Eq. 240. In the last-cited case, which was an indictment for the obstruction of a river, Lord Campbell, C. J., said: "According to the authority of Lord Hale, to that of Lord Tenterden, in Rex *v.* Russell, 6 B. & C. 566, and to the opinion of this court in Rex *v.* Ward, 4 A. & E. 384, it is for the jury to say, whether an erection of this kind is a damage to the navigation or not. That the utility of such a work to the neighborhood, or to the public interests generally, may be taken into account as a compensation is a point on which, with great deference, I cannot concur with the majority of the judges who decided Rex *v.* Russell. The true question is, whether a damage accrues to the navigation in the particular locality; and that is a question for a jury. An indictment would not lie merely for erecting piers in a navigable river; it must be laid '*ad commune nocumentum*,' and whether it was so or not must be decided by the jury." p. 1037 of Q. B. Report.

[3] Atlee *v.* Packet Co., 21 Wal. 389. And see Rex *v.* Clueworth, Holt, 339; Beach *v.* People, 11 Mich. 106; The State *v.* Wilson, 42 Maine, 9.

[4] Weathered *v.* Bray, 7 Ind. 706. See post, § 1283.

[5] The Vancouver, 2 Sawyer, 381. Thus, in a case of **Ways Crossing.**—Each must somewhat obstruct the other, yet neither is indictable. So it is in the case of a bridge over a navigable river. Both are highways, and the bridge more or less obstructs the navigation of the river. **States and United States.** — The navigable rivers connecting State with State are, as highways, within the juris-

§ 1273. **Methods of Obstruction.** — The methods of obstruction are numerous. Thus, —

In Navigable Waters. — The cutting down of the banks of a river so as to divert its waters,[1] the building improperly of wharves in a harbor,[2] and the making of an unauthorized bridge over a navigable stream,[3] — are severally instances of indictable obstruction.

In Carriage Ways. — If a carriage way is laid out of a given width, the public have a right to the use of the whole of it, whether it is worked or not.[4] Then, if a turnpike company erects or maintains a gate after its charter has expired,[5] or, if an individual places a barrier to travel or digs a ditch across the street,[6] or allows the steps to his house [7] or a fence [8] or any other permanent thing [9] to project past the line of the road, or if a man by a mill-dam overflows the highway,[10] or places in the way a bridge without public utility,[11] — in these and other like instances an indictable nuisance is committed. Again, —

dictional power of the United States. See Vol. I. § 174–176. Therefore it is not within the power of a State wholly to obstruct such a river by a bridge. Still, as bridges are often of high public utility, this utility may be set up in some measure, and within limits not well defined, in defence of a charge of obstructing the navigation of a river. And see, on this subject, Mississippi, &c., Railroad *v.* Ward, 2 Black, 485; Works *v.* Junction Railroad, 5 McLean, 425; Woodman *v.* Kilbourn Manuf. Co., 1 Abb. U. S. 158; Avery *v.* Fox, 1 Abb. U. S. 246; Pilcher *v.* Hart, 1 Humph. 524, 533; People *v.* Vanderbilt, 28 N. Y. 396. **Bridge obstructing Navigation.** — If a bridge is built under due authority across a navigable river, still if it is so built as to obstruct navigation more than is reasonably necessary, it is a nuisance, and the subject of indictment. The State *v.* Freeport, 43 Maine, 198. And see post, § 1278.

[1] Rex *v.* Stanton, 2 Show. 30. And see People *v.* St. Louis, 5 Gilman, 351.

[2] Rex *v.* Grosvenor, 2 Stark. 511.

[3] Pennsylvania *v.* Wheeling and Belmont Bridge, 13 How. U. S. 518.

[4] Dickey *v.* Maine Telegraph, 46 Maine, 483; Morton *v.* Moore, 15 Gray, 573; The State *v.* Merrit, 35 Conn. 314; post, § 1277.

[5] Adams *v.* Beach, 6 Hill, N. Y. 271. See The State *v.* Passaic Turnpike, 3 Dutcher, 217; Wroe *v.* The State, 8 Md. 416.

[6] Justice *v.* Commonwealth, 2 Va. Cas. 171; Allen *v.* Lyon, 2 Root, 213; Wales *v.* Stetson, 2 Mass. 143; The State *v.* Yarrell, 12 Ire. 130; The State *v.* Miskimmons, 2 Ind. 440; Beatty *v.* Gilmore, 4 Harris, Pa. 463, 469; Kelly *v.* Commonwealth, 11 S. & R. 345; The State *v.* Hunter, 5 Ire. 369.

[7] Hyde *v.* Middlesex, 2 Gray, 267, Commonwealth *v.* Blaisdell, 107 Mass. 234.

[8] Gregory *v.* Commonwealth, 2 Dana, 417; Mosher *v.* Vincent, 39 Iowa, 607.

[9] Reg. *v.* United Kingdom Electric Telegraph, 9 Cox C. C. 137; Garland *v.* Towne, 55 N. H. 55; Reg. *v.* Train, 9 Cox C. C. 180; Commonwealth *v.* Erie and Northeast Railroad, 3 Casey, 339. And see The State *v.* Dover, 46 N. H. 452; Wyman *v.* The State, 13 Wis. 663.

[10] The State *v.* Phipps, 4 Ind. 515. See Prim *v.* The State, 36 Ala. 244.

[11] Rex *v.* West Riding of Yorkshire, 2 East, 342.

Adjacent Foulness — Things Overhanging. — "It is a nuisance," says Russell, "to suffer the highway to be incommoded by reason of the foulness of the adjoining ditches, or by boughs of trees hanging over it, &c.; . . . and it is said, that the owner of the land next adjoining to the highway ought of common right to scour his ditches; but that the owner of land next adjoining to such land is not bound by the common law so to do, without a special prescription; and it is also said, that the owner of trees, hanging over a highway to the annoyance of travellers, is bound by the common law to lop them; and that any other person may lop them, so far as to avoid the nuisance."[1] Also, —

Outcries and Loud Noises. — Within limits not well defined, outcries and loud noises in a public street are indictable nuisances.[2] Moreover, —

Spring Guns. — It is a nuisance to endanger travellers by setting spring guns along the way.[3]

Other Danger avoided. — When the owner of a mill-dam, to prevent its being broken by a flood, cut it at one end, and so caused an injury to the highway near, which injury would have been as great if the dam had broken by its own weight of waters, he was held, nevertheless, to be indictable.[4]

§ 1274. **Private Use of Public Way.** — Men have no right to use the public ways for their own private benefit, except in a manner not to obstruct their use by the public. They may travel over them to and from their homes, and make such occupancy of them at the point of starting as is necessary, and not inconsistent with the general use; but further they cannot go.[5] Therefore, —

Carrying on Business in Street. — In an English case, the court held to be indictable a man who, in a city, habitually had his wagons on one side of the street before his warehouse loading and unloading, for several hours at a time, day and night; one wagon, at least, being usually there, and his goods lying on the

[1] 1 Russ. Crimes, 3d Eng. ed. 347. **Overhanging.** — And see, as to things overhanging, Hyde *v.* Middlesex, 2 Gray, 267; Commonwealth *v.* Goodnow, 117 Mass. 114; post, § 1275.

[2] Commonwealth *v.* Oaks, 113 Mass. 8; The State *v.* Widenhouse, 71 N. C. 279; The State *v.* Hughes, 72 N. C. 25.

[3] The State *v.* Moore, 31 Conn. 479; **Vol. I. § 856.**

[4] The State *v.* Knotts, 2 Speers, 692.

[5] And see The State *v.* Buckner, Phillips, 558. **Processions.** — As to the rights of processions, see Commonwealth *v.* Ruggles, 6 Allen, 588; The State *v.* Hughes, 72 N. C. 25. **Sidewalks.** — As to obstructions of the sidewalk, see Furnell *v.* St. Paul, 20 Minn. 117; Reg. *v.* Plummer, 30 U. C. Q. B. 41; Reading *v.* Commonwealth, 1 Jones, Pa. 196.

ground ready to be loaded; though, on the opposite side of the street, there was room for carriages to pass two abreast. "The court said, that it should be fully understood that the defendant could not legally carry on any part of his business in the public street, to the annoyance of the public, — that the primary object of the street was for the free passage of the public, and any thing which impeded that free passage, without necessity, was a nuisance, — that, if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises or remove his business to some more convenient spot."[1] The same has been held of sawing timber in a public street, though done solely to enable the defendant to get it into his yard.[2] And constables obstructing the streets by their sales, commit this offence, there being no necessity for this use.[3] But what is necessary for the individual to do, of the general kind before mentioned, may be done, in order that thus he may the better enjoy the way for its primary purpose, travel.[4]

Owning the Soil. — In these and other cases, it is no defence for a man that he owns the fee, subject to the public easement, of the land on which the act of obstruction is done.[5]

[1] Rex *v.* Russell, 6 East, 427, 2 Smith, 424. And see People *v.* Cunningham, 1 Denio, 524; Rex *v.* Cross, 3 Camp. 224; Reg. *v.* Sheffield Gas Co., 22 Eng. L. & Eq. 200; Gerring *v.* Barfield, 16 C. B. N. S. 597; Janesville *v.* Milwaukee, &c., Railroad, 7 Wis. 484; Commonwealth *v.* Capp, 12 Wright, Pa. 53; Sanders *v.* The State, 18 Ark. 198; Commonwealth *v.* New York, &c., Railroad, 112 Mass. 409; Wood *v.* Mears, 12 Ind. 515; Darling *v.* Westmoreland, 52 N. H. 401.

[2] Rex *v.* Jones, 3 Camp. 230, Lord Ellenborough remarking: "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray, into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway; but this must be done with promptness. So as to the repairing of a house; the public must submit to the inconvenience occasioned necessarily in repairing the house: but, if this inconvenience is prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. I cannot bring myself to doubt of the guilt of the present defendant. He is not to eke out the inconvenience of his own premises by taking in the public highway into his timber-yard; and, if the street be narrow, he must move to a more commodious situation for carrying on his business."

[3] Commonwealth *v.* Milliman, 13 S. & R. 403. **Military Parade.** — And see, as to the use of the streets for purposes of military parade, Moody *v.* Ward, 13 Mass. 299; Cole *v.* Fisher, 11 Mass. 137. **Fair.** — As to holding a fair or market, Rex *v.* Smith, 4 Esp. 111.

[4] And see Commonwealth *v.* Passmore, 1 S. & R. 217.

[5] The State *v.* Hessenkamp, 17 Iowa, 25; Langsdale *v.* Bonton, 12 Ind. 467

§ 1275. **Collecting People.** — The collecting together of a concourse of people in a street may amount to an indictable obstruction.[1] But —

Building larger House. — It is no crime to darken a way by erecting on it a larger house than stood there before.[2]

Dilapidated House — Overhanging. — If, however, one having a house on the way suffers it to become dilapidated and likely to fall, he is punishable, on account of the danger to the public.[3] And for the same reason one occupying a house which hangs over a bridge, must keep it in repair; else he is liable to indictment.[4]

§ 1276. **Rule varying with Circumstances.** — Unquestionably some consideration must be given to the nature of the travel contemplated by the authority establishing the road, to whether it is in city or country, and to all other things of like character. In one case the doctrine was laid down, that —

Too heavy Load. — An information will lie against a carrier for spoiling the highways by drawing over them an extraordinary weight, contrary to the custom of the realm.[5] And another case holds, that —

Vessel too large. — To bring a ship of three hundred tons into Billingsgate dock, which is a dock for only smaller vessels, is a public nuisance; the court observing: "Why may there not be a *common dock* only for small ships as well as a *common pack* and *horse-way;* and, if a man with a cart use such a way so as to plough it and render it less convenient for riders, will not that be a nuisance indictable?"[6]

§ 1277. **Tree or Post.** — We have seen, that, to put a permanent obstruction on any part of a public way, though not the part worked for travel, is indictable.[7] Still it appears that there may

And see Overman *v.* May, 35 Iowa, 89; Shawnee *v.* Beckwith, 10 Kan. 603.

[1] Barker *v.* Commonwealth, 7 Harris, Pa. 412; People *v.* Cunningham, 1 Denio, 524. See Rex *v.* Sarmon, 1 Bur. 516, where an indictment for setting a person in a public footway of London, to deliver out bills of the defendant's business, whereby the way became obstructed, was quashed; the report of the case not showing, however, whether the objection was to the form or substance of the allegation.

[2] Rex *v.* Webb, 1 Ld. Raym. 737.

[3] Reg. *v.* Watts, 1 Salk. 357.

[4] Reg. *v.* Watson, 2 Ld. Raym. 856, 3 Ld. Raym. 18. And see ante, § 1273 and note.

[5] Rex *v.* Edgerly, March, 131 pl. 216.

[6] Reg. *v.* Leech, 6 Mod. 145.

[7] Ante, § 1273.

be circumstances in which a tree or post, standing on the margin of the way, will not be deemed a nuisance.[1] The general doctrine, however, makes every such thing an offence in him who places it there, while yet —

Duty to repair. — The corporation, obliged to repair, is not compellable to furnish more than the travelled part for the public use. "The town," it was said in one case, "to enable itself to discharge its obligation to the public, requires the full and entire use of the whole located way."[2]

Travellers meeting. — A sort of obstruction occurs where a traveller, meeting another, does not obey the law of the road in turning to the side of the travelled part.[3] The duty and the penalty are generally prescribed by statutes, and the author never met a case involving the question of indictability at the common law.

§ 1278. **Authorized by Statute.** — It is competent for legislation to authorize changes and obstructions in the public ways, and what is thus sanctioned cannot be an indictable nuisance.[4] But if the person goes beyond his authority, or otherwise departs from it, he is indictable; since he cannot rely on a license to do one thing, as a protection for doing another.[5] And if the legislature gives permission to run locomotives on a railway, no indictment can be maintained against the railroad company for the nuisance as tending to frighten horses driven over an adjoining travelled road.[6]

§ 1279. **The Intent.** — The discussions in the first volume will, in a general way, show the intent with which the act of obstruction must be done to be indictable.[7] Damage which comes to

[1] Franklin Turnpike *v.* Crockett, 2 Sneed, 263. See The State *v.* Caldwell, 2 Speers, 162; ante, § 1273.

[2] Commonwealth *v.* King, 13 Met. 115. And, on this point, see further, Commonwealth *v.* Wilkinson, 16 Pick. 175; Lancaster Turnpike *v.* Rogers, 2 Barr, 114; The State *v.* Pollok, 4 Ire. 303.

[3] Commonwealth *v.* Allen, 11 Met. 403.

[4] Butler *v.* The State, 6 Ind. 165; Danville, &c., Railroad *v.* Commonwealth, 23 Smith, Pa. 29; Oliver *v.* Loftin, 4 Ala. 240; The State *v.* Loudon, 3 Head, 263.

[5] Commonwealth *v.* Church, 1 Barr, 105; Renwick *v.* Morris, 7 Hill, N. Y. 575; Reg. *v.* Scott, 2 Gale & D. 729, 3 Q. B. 543; Rex *v.* Morris, 1 B. & Ad. 441; Hogg *v.* Zanesville Canal and Manuf. Co., 5 Ohio, 410; Commonwealth *v.* Erie and Northeast Railroad, 3 Casey, 339; Louisville, &c., Railroad *v.* The State, 3 Head, 523.

[6] Rex *v.* Pease, 4 B. & Ad. 30. And see Commonwealth *v.* Temple, 14 Gray, 69.

[7] And see Tate *v.* The State, 5 Blackf 73; Prim *v.* The State, 36 Ala. 244.

the road necessarily or accidentally from the lawful use of it, cannot be made the foundation for an indictment.[1]

III. *The Condition of Repair in which the Way must be put and kept.*

§ 1280. **In General — Varying Circumstances.** — This, in the nature of the subject, does not admit of exact rule. Some considerations mentioned in a previous section[2] apply here; the doctrine being, that the required condition of the way depends on the particular nature and circumstances of the case, and the object for which it is used. The English books say, that one bound by prescription to repair need not put the road in better order than it has been in time out of mind.[3] The revised statutes of Maine require it to be "safe and convenient;" and the courts hold, that the question whether it is so, is one of fact for the jury.[4] It is not sufficient, in discharge of a duty to repair a road, under such a statute, that it is made "safe," it must also be "convenient."[5]

Whether Entire Width. — It is held in Maine, that a town is not required to render commodious for travel the entire space laid out for a road; the work may be limited to a sufficient travelled part.[6] But plainly, in compact localities, like our cities and large villages, the entire located way will be required for travel.

Lighting Bridge. — The charter of a toll-bridge corporation required that the bridge "shall at all times be kept in good, safe, and passable repair." And it was held that this required the corporation to light the bridge, if the jury find such lighting necessary to the safety and convenience of those passing it at night.[7]

Paving Cart-way. — No indictment, says an old English case, lies against a township for not *paving* a cart-way; because the township is under obligation only to repair, not to pave.[8]

[1] Rex *v.* Watts, 2 Esp. 675; Cummins *v.* Spruance, 4 Harring. Del. 315. And see Vol. I. § 829.

[2] Ante, § 1276.

[3] Reg. *v.* Cluworth, 6 Mod. 163; s. c. nom. Reg. *v.* Clueworth, Holt, 339.

[4] Merrill *v.* Hampden, 26 Maine, 234. And see Myers *v.* Springfield, 112 Mass. 489; Hodgkins *v.* Rockport, 116 Mass. 573; Howard *v.* Mendon, 117 Mass. 585, The State *v.* Dover, 46 N. H. 452.

[5] Commonwealth *v.* Taunton, 16 Gray, 228.

[6] Dickey *v.* Maine Telegraph, 46 Maine, 483; ante, § 1277.

[7] Commonwealth *v.* Central Bridge, 12 Cush. 242.

[8] Rex *v.* Marton, Andr. 276.

Horse-way. — If the way is merely a horse-way, there is no need of making it fit for carriages to pass over.[1]

Repairs required on Sunday. — If a dangerous defect is found in a highway on Sunday, it should be mended at once, or adequate warning be given to travellers.[2]

IV. *The Person or Corporation responsible for Non-repair.*

§ 1281. **Indictable.** — The doctrine under this sub-title is, that the person, private or official, or corporation, on whom the law casts the duty, is indictable for its neglect.[3] And sometimes this liability is affirmed by statute.[4]

On whom the Duty. — At common law, say the cases, the onus of the repair of a bridge, when the obligation arises *ratione tenuræ*, falls ultimately on the owner of the soil, not the occupier;[5] though the occupier may be equally in the first instance liable to the public.[6] Generally, under the common law in England, the inhabitants of the counties are to repair the bridges;[7] but, in many cases, the rule is otherwise by prescription.[8] The common-law liability for the repair of other public ways is, *prima facie*, on the parish in which they are situated;[9] though the rule is here also different, oftentimes, by prescription.[10] It is not clear that this

[1] Rex *v.* St. Weonard, 5 Car. & P. 579. And see Reg. *v.* Stretford, 2 Ld. Raym. 1169; s. c. nom. Reg. *v.* Stratford, 11 Mod. 56.

[2] Flagg *v.* Millbury, 4 Cush. 243.

[3] 1 Russ. Crimes, 3d Eng. ed. p. 351; The State *v.* Murfreesboro, 11 Humph. 217; Commonwealth *v.* Hancock Free Bridge, 2 Gray, 58; Rex *v.* Ireton, Comb. 396; The State *v.* King, 3 Ire. 411; The State *v.* Haywood, 3 Jones, N. C. 399; Hill *v.* The State, 4 Sneed, 443; The State *v.* Landaff, 2 Fost. N. H. 588; The State *v.* Whitingham, 7 Vt. 390.

[4] The State *v.* Chinn, 29 Texas, 497; People *v.* Cooper, 6 Hill, N. Y. 516; The State *v.* Madison, 59 Maine, 538; The State *v.* Kittery, 5 Greenl. 254; The State *v.* Loudon, 3 Head, 263.

[5] Baker *v.* Greenhill, 2 Gale & D. 435, 6 Jur. 710. See Rex *v.* Kerrison, 1 M. & S. 435; Reg. *v.* Bucknell, Holt, 128.

[6] Ante, § 1275, and the cases there cited.

[7] Reg. *v.* Wilts, 6 Mod. 307, Holt, 339; Rex *v.* Oxfordshire, 1 B. & Ad. 289; Rex *v.* Lancashire, 2 B. & Ad. 813; Rex *v.* Devonshire, 2 Nev. & M. 212; Rex *v.* Bucks, 12 East, 192. This part of the common law was never adopted in New Jersey. The State *v.* Hudson, 1 Vroom, 137, 188.

[8] Reg. *v.* Wilts, 6 Mod. 307; Reg. *v* Bucknell, Holt, 128, 7 Mod. 55; Rex *v.* Hendon, 4 B. & Ad. 628; Rex *v.* Northampton, 2 M. & S. 262; Rex *v.* Stoughton, 2 Saund. 157; Rex *v.* Oxfordshire, 16 East, 223.

[9] 1 Russ. Crimes, 3d Eng. ed. 352; Rex *v.* Ragley, 12 Mod. 409; Rex *v.* St. Giles, 5 M. & S. 260.

[10] See Reg. *v.* Barnoldswick, 12 Law J. N. S. M. C. 44; Rex *v.* Clifton, 5 T. R. 498; Roberts *v.* Hunt, 15 Q. B. 17; Reg. *v.* Nether Hallam, 3 Com. Law, 94, 29 Eng. L. & Eq. 200; Rex *v.* Stratford-upon-Avon, 14 East, 348; Rex *v.* Edmonton, 1 Moody & R. 24; Rex *v.* Hayman,

part of the English common law has, to any extent, been adopted in our States; at all events, the scope for it, with us, is small.

§ 1282. **Statutes.** — Generally, in our States, the question, who is liable for repair, or for the original construction, depends on statutes; and they are so numerous and diverse that we shall not do well to attempt a particular discussion of them. There are circumstances under which an individual and a corporation may be equally indictable for the same neglect.[1] Authorities on various questions under the statutes appear in a note.[2]

§ 1283. **Way which the Owner of the Soil has diverted.** — It is laid down in one of the reports, that, in the language of the book itself, "where a highway lies over an open field, and the owner of the field turns the way to another part of the field for his own convenience, or encloses the field for his own benefit, and leaves a sufficient way besides, he is bound to repair and maintain that way at his own charge, and he must make it passable, though it was founderous before; and, if the way is not sufficient, any passenger may break down the enclosure and go over the land, and justify it till a sufficient way is made."[3]

V. *Remaining and Connected Questions.*

§ 1284. **Misdemeanor.** — It scarcely need be said, that the offences discussed in this chapter are, at the common law, misdemeanor, not felony.[4]

§ 1285. **Abatement by Private Person.** — This was considered in the preceding volume.[5]

Moody & M. 401; Reg. *v.* Bamber, 5 Q. B. 279, Dav. & M. 367; Rex *v.* Ecclesfield, 1 B. & Ald. 348, 1 Stark. 393; Rex *v.* West Riding of Yorkshire, 4 B. & Ald. 623; Reg. *v.* Heage, 1 Gale & D. 548, 2 Q. B. 128, 6 Jur. 367; Reg. *v.* Wilts, Holt, 339; Rex *v.* Leake, 2 Nev. & M. 583, 5 B. & Ad. 469; Reg. *v.* Midville, 4 Q. B. 240, 3 Gale & D. 522.

[1] Ante, § 1270. See also, to this proposition, Commonwealth *v.* Piper, 9 Leigh, 657; The State *v.* Halifax, 4 Dev. 345; The State *v.* Nicholson, 2 Murph. 135; The State *v.* Barksdale, 5 Humph. 154; The State *v.* Commissioners, Walk. Missis. 368; Rex *v.* Dixon, 12 Mod. 198; Hill *v.* The State, 4 Sneed, 443.

[2] The State *v.* Gorham, 37 Maine, 451; Follett *v.* People, 2 Kernan, 268; Morris Canal and Banking Co. *v.* The State, 4 Zab. 62; Indianapolis *v.* McClure, 2 Ind. 147; The State *v.* Hogg, 5 Ind. 515.

[3] Anonymous, 3 Salk. 182. And see Rex *v.* Devonshire, 2 Nev. & M. 212; Rex *v.* Flecknow, 1 Bur. 461, 465; Rex *v.* Warde, Cro. Car. 266; Hedgepeth *v.* Robertson, 18 Texas, 858.

[4] The State *v.* Knapp, 6 Conn. 415.

[5] Vol. I. § 828; Dimmett *v.* Eskridge, 6 Munf. 308. See Hopkins *v.* Crombie, 4 N. H. 520, 526.

Punishment. — The leading object of prosecuting this class of offences is usually to procure the repair of the way, or abatement of the nuisance; and the court takes this into consideration in awarding its sentence. In one case, the defendant, indicted for non-repair, pleaded guilty, "but the court, before they would set a fine, would be certified by some of the justices of the peace of the neighborhood, that the way was sufficiently repaired."[1] If it is repaired, or the nuisance removed, the fine may, in the discretion of the court, be merely nominal.[2]

Judgment of Abatement. — But the judgment may itself direct the abatement of the nuisance;[3] yet this will be omitted if it has been already abated.[4] There is no rule making abatement a necessary part of the judgment under all circumstances.[5]

Way discontinued. — In a Vermont case, where a town, after being indicted for the non-repair of a highway, discontinued it, and made another in its place, the court held this proceeding not to preclude a trial on the indictment.[6]

§ 1286. **Further of the Sentence.** — In one case the court having fined the defendant for the non-repair of a bridge, and then learning that it was still out of repair imposed an additional fine on the same proceeding. But the superior tribunal held this to be unauthorized.[7] It might well have delayed sentence; and, if the proper repairs were not in due time made, imposed a heavy penalty.[8]

Indictment for Continuance. — Or, a fresh indictment might have been maintained for the continuance of the neglect to repair.[9] Likewise, indictments are sustainable for continuing obstructions in a way.[10]

§ 1287. **Guide-Posts.** — By statute in New Hampshire, "if any town shall neglect to erect or keep in repair [a] guide-post or guide-board at each intersection of the highways therein, they

[1] Reg. v. Cluworth, 6 Mod. 163.

[2] Rex v. Incledon, 13 East, 164; Reg. v. Dunraven, W. W. & D. 577. See Rex v. Hertford, Holt, 320; Rex v. Chedinfold, Cas. temp. Hardw. 159.

[3] Taggart v. Commonwealth, 9 Harris, Pa. 527.

[4] Rex v. Incledon, 13 East, 164.

[5] Vol. I. § 824; Rex v. West Riding of Yorkshire, 7 T. R. 467.

[6] The State v. Fletcher, 13 Vt. 124.

[7] Rex v. Machynlleth, 4 B. & Ald. 469.

[8] Reg. v. Claxby, 3 Com. Law, 223, 1 Jur. N. S. 710, 30 Eng. L. & Eq. 358.

[9] Rex v. Old Malton, 4 B. & Ald. 469, note; Rex v. Reynell, 6 East, 315, 2 Smith, 406.

[10] 3 Chit. Crim. Law, 613, 617, 618; Rex v. West Riding of Yorkshire, 7 T. R 467.

shall forfeit for each month's neglect the sum of one dollar." And it is held, that, though there are more intersections than one in the town without guide-posts, only one penalty is incurred for the entire neglect during a month, not one penalty for each neglected intersection.[1]

[1] Clark *v.* Lisbon, 19 N. H. 286. And see The State *v.* Mathis, 30 Texas, 506.

ANALYTICAL INDEX.

NOTE. — The object of this Index is chiefly to show the order of the discussion; so that one who cannot find a thing in the "Alphabetical Index" may see where to open the volumes, and look for it among the headings of the sections. It does not attempt a reference to every minor topic.

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NOTE. — In the second volume, the attempt to commit each specific offence is treated of in connection with the offence itself. See, in this index, the names of the several offences.

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